27

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 299.

TENNESSEE COAL, IRON AND RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WILEY GEORGE.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

FILED JULY 12, 1912.

(23,288)

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1 GEORGIA,
Fulton County:

Be it remembered that on the fifth day of June, 1911, at the regular May term of the City Court at Atlanta, Fulton County, Georgia, before Hon. H. M. Reid, judge thereof, presiding, there came on to be tried the case of Wiley George against Tennessee Coal, Iron & Railroad Company, same being a suit for damages for personal injuries, brought by attachment against the defendant on the ground of its non-residence in the State of Georgia.

On said fifth day of June the plaintiff demurred orally to, and moved to strike, the fifth paragraph of the plea of the defendant to the second count of the plaintiff's declaration in attachment, said paragraph of said plea being as follows, towit: "Answering paragraph fourteen (14) of the second count in plaintiff's declaration, this defendant says that if section 3910 of the Alabama Code of 1907 is therein correctly copied, the provisions thereof cannot be invoked in this court, because of the provisions of the law of Alabama as found in said code of Alabama of 1907 in section 6115, which provisions are in the following language, towit: 'All actions brought under section- 2486 and 3910 must be brought in a court of competent jurisdiction within the State of Alabama, and not elsewhere.' By reason whereof defendant says that in this court
2 and in said case the law of Alabama as expressed in section 3910 of the code of 1907 is irrelevant and immaterial."

After argument of counsel on said motion the same was sustained and said paragraph five (5) of the answer and plea of the defendant to the second count of plaintiff's declaration was stricken on the ground that the courts of Georgia will not enforce the statutes of Alabama found in section 6115 of the code of 1907 of that state in a suit brought in Georgia founded on the employers' liability act of Alabama as shown in section 3910 of the code of Alabama.

To this order and judgment the defendant then excepted and thereafter in regular course filed its exceptions pendente lite, and it now assigns error thereon and says that the court erred in striking said paragraph of said plea.

On the sixth day of June, 1911, during the trial of said case the plaintiff in open court dismissed the first count in his declaration in attachment and the same was by the order of the court, dated June 6, 1911, stricken from said declaration and the cause proceeded on the second count alone. Whereupon the defendant filed an amended plea in said case, as follows, towit: "Now comes the defendant in the above stated case on this the seventh day of June, 1911, after
3 the plaintiff had stricken the first count in the declaration in attachment in said case, which count was based on the common law rights and obligations of master and servant, and said case was ordered to proceed under the second count thereof based upon the statute of Alabama as found in section 3910 of the code of 1907 of said state, and respectfully shows to the court: That the court should

not proceed further in said case, for that under the statute of Alabama as found in said code of 1907, section 6115, said code itself being a single statute of the State of Alabama, it is provided that all actions under said section 3910 must be brought in a court of competent jurisdiction within the State of Alabama and not elsewhere.

This defendant says that the provisions of said section 6115 are an express restriction of the right of action under said section 3910, and form limitations upon said right which this defendant is entitled to have the courts of Georgia and all other states respect and give full faith and credit to.

Wherefore defendant prays that said action be abated and discontinued and dismissed at plaintiff's costs, for that to continue said cause of action under the statute of Alabama in this honorable court would be to deny to this defendant the equal protection of the laws as guaranteed to it under article 14, section 1 of the amend-
4 ments to the constitution of the United States, and would amount to the enforcement of a law which abridges the privilege and immunity of this defendant as a citizen of the United States, contrary to the provision of said article 14, section 1 of the amendments to the constitution of the United States; and because to continue said case on said statutory cause of action given by the statutes of Alabama and restricted by said statutes to the court of Alabama, in this court and in this cause, would be a denial so far as the rights of this defendant are concerned, of full faith and credit to said public acts of the state of Alabama in the state of Georgia, contrary to the provisions of article 4, section 1 of the constitution of the United States.

This defendant invokes the protection of the constitution of the United States in the articles and sections quoted, and prays thereunder for the dismissal of said case in said court for the reasons aforesaid, and prays judgment of the court accordingly."

Plaintiff moved to strike said amended plea, and after argument of counsel the same was stricken by the court in an order thereon dated June 7, 1911, which is as follows, towit:

"Upon motion of the plaintiff, the foregoing plea is
5 stricken on the ground that the courts of Georgia will not enforce the statute of Alabama found in section 6615 of the code of 1907 of that state in a suit brought in Georgia founded on the Employers' Liability Act of Alabama found in section 3910 of said code of Alabama.

In open court, this June 7th, 1911.

H. M. REID,
Judge City Court of Atlanta."

The defendant excepted to said order and judgment of the court striking said amended plea on each and all of the grounds in said plea set forth, and on the ground that by said order striking said plea the court denied the said defendant its rights under the constitution of the United States as in said plea fully set forth and invoked; exceptions pendente lite to said order and judgment were duly ap-

proved and filed, and the defendant now assigns error on said pendente lite exceptions in this honorable court and says that the court erred in striking said plea on each and all of the grounds stated.

Said case proceeded to a verdict in favor of the plaintiff in the sum of $11,500 and costs of court, and while the jury was still in the jury box, after said verdict had been received and published by plaintiff's counsel, the defendant requested and moved the
6 court in open court, in the presence of the jury, and before the jury had dispersed, and while they were still together in the jury box, and before said verdict had been recorded, as follows, towit: "Having reason to suspect a practice with the juries in this county of arriving at verdicts in illegal ways, such as by agreements in advance to abide by the vote of less than the whole twelve as to whether the finding should be in favor of the plaintiff or the defendant, and by agreements in advance to fix the amount of recoveries as damages at the average arrived at by totalling the amounts expressed by each individual juror and dividing the sum by twelve and thus producing a quotient or speculative verdict, I respectfully request, on behalf of the defendant, that this jury be polled and each juror interrogated as to whether the verdict rendered is his individual verdict unaffected by any agreement among the jurors in advance of arriving at it, by which it was found to be in favor of the plaintiff, and independent of any agreement with the other jurors in advance of arriving at it, by which the amount of it was fixed by any calculation of averages of the estimates of individual jurors."

Said request and motion was then and there by the court overruled. To which action the defendant excepted, and thereafter duly had approved and filed its exceptions pendente lite, and
7 it now assigns error thereon in this honorable court and says that the court erred in not holding the jury and propounding to it the questions set forth in said request. Evidence was introduced in said case by both plaintiff and defendant. Argument of counsel to the court and jury was had and the jury was charged by the court in regular course, and verdict and judgment was rendered in favor of the plaintiff, as appears of record. The defendant being dissatisfied with said verdict and judgment filed its motion for new trial, as appears of record, and likewise the approved brief of evidence and charge of court, and afterwards, on the 8th day of September, 1911, the defendant filed its amended motion for a new trial, the recitals of fact in which and in the original motion were duly certified by the court, all as appears of record in said case.

Said motion for new trial came on for hearing, and argument before the court in regular course was had thereon, and the same was taken under consideration by the judge of said court, and on the 27th day of October, 1911, said court rendered its order and judgment overruling said motion for a new trial upon each and all of the grounds therein stated. To which order and judgment overruling said motion for new trial the defendant excepted, and

not excepts, and assigns error thereon, and says that the
8 court erred in not granting said motion for new trial upon each and all of the grounds set forth in the original motion for new trial in said case and in the amended motion for new trial in said case, as appears of record.

The defendant specifies the following portions of the record in said case as material to a clear understanding of the errors in this bill of exceptions set forth, towit:

1. The declaration in attachment in said case including both counts.

2. The plea and answer of the defendant filed February 20, 1911.

3. The order of the court striking the first count in said declaration in attachment, dated June 6, 1911.

4. The amendment to plea of defendant filed June 7, 1911.

5. The order and judgment of the court striking paragraph five (5) of the answer and plea of the defendant to the second count of said declaration in attachment, dated June 5, 1911.

6. The order and judgment of the court striking the amended plea of the defendant filed in said case after the first count in said declaration was stricken, said order and judgment being dated June 7, 1911.

7. The bill of exceptions pendente lite filed by the defend-
9 ant and approved by the court and made a part of the record on the 8th day of June, 1911.

8. The verdict of the jury dated June 7, 1911.

9. The judgment in favor of the plaintiff in said case, dated June 10, 1911.

10. The original motion for new trial filed by the defendant on the 8th day of June, 1911, with rule nisi and service thereon.

11. The amended motion for new trial allowed, approved and ordered filed September 8, 1911, with orders allowing and approving same on said date.

12. The brief of evidence, with order and entries thereon, filed on the 16th day of September, 1911.

13. The charge of the court with the approval of the judge thereon dated on the 20th day of June, 1911, and filed on the 16th day of September, 1911.

14. The judgment of the court overruling motion for new trial dated 27th day of October, 1911.

The entries of filing of each and all of the parts of the record above specified to be entered and transmitted in the proper order.

And now within the time provided by law and within thirty days of the entry of the judgment overruling said motion for new
10 trial, comes the defendant and tenders this its bill of exceptions and prays that the same may be certified as provided by law, in order that the errors complained of may be considered and corrected by the Court of Appeals of Georgia.

SMITH, HAMMOND & SMITH,
Attorneys for Plaintiff in Error.

P. O. Address: 508-12 Grant Building, Atlanta, Ga.

GEORGIA, *Fulton County:*

I do certify that the foregoing bill of exceptions is true, and contains all the evidence, and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of the City Court of Atlanta, Fulton County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the proper term of the Court of Appeals of Georgia, that the errors alleged to have been committed may be considered and corrected.

This 1 day of Nov., 1911.

H. M. REID,
Judge City Court of Atlanta.

11 Due and legal service of the foregoing bill of exceptions and writ of error is hereby acknowledged, copies received, and all other and further service waived.

This 2 day of November, 1911.

R. R. ARNOLD,
LAMAR HILL,
Attorneys for Wiley George, Defendant in Error.

Filed in office Nov. 3, 1911.

ARNOLD BROYLES, *Clerk.*

12 GEORGIA, *Fulton County:*

I hereby certify, that the foregoing bill of exceptions, hereunto attached, is the true original bill of exceptions in the case stated, towit: Tennessee Coal, Iron and Railroad Company, plaintiff in error, vs. Wiley L. George, defendant in error, and that a copy hereof has been made and filed in this office.

Witness my signature and the seal of court affixed this the 11th day of November, 1911.

[SEAL.] ARNOLD BROYLES,
Clerk Superior Court, Fulton County, Georgia,
Ex-Officio Clerk City Court of Atlanta.

13 (Endorsed:) Case No. 3846. Court of Appeals of Georgia October Term, 1911. Tennessee Coal, Iron & Railroad Company v. Wiley L. George. Bill of Exceptions. Filed in office Nov. 14, 1911. W. E. Talley, D. C. C. A. Ga.

14 (*Declaration in Attachment.*)

City Court of Atlanta.

21495.

WILEY L. GEORGE
v.
TENNESSEE COAL, IRON & R. R. Co.

Attachment.

To the City Court of Atlanta:

First Count.

The petition of Wiley L. George, who is the plaintiff in the attachment above named, shows to the court the following case:

1. The defendant hereto is the Tennessee Coal, Iron and Railroad Company, which is a corporation and which operates various mines and furnaces.

2. The said defendant has endamaged plaintiff in the sum of twenty thousand ($20,000.00) dollars on account of the case which will now be stated.

3. On the 11th day of April, 1910, plaintiff sued out an attachment against the defendant before J. B. Ridley, a justice of the peace in and for Fulton County, returnable to the May Term, 1910, of the City Court of Atlanta, to recover the sum of twenty thousand ($20,000.00) dollars.

4. Said attachment was on the 13th day of April, 1910,
15 levied on the following described property of the defendant in the county of Bartow, Georgia to wit: Land Lots 757, 758, 827, 828, 830, 831, 898, 899, 901, 903, 969, 970, 974, 1044 part of lot 902, 1175, 1199, 1268, 1100, 1275, 118, 971, 972, 973 and 975 part and of said land lots being in the Fourth District and Third Section of originally Cherokee, now Bartow county, Georgia; and also land lots 862, 864, 937, 936 and 938, all of said land lots being in the Twenty-first District and section of originally Cherokee, now Bartow County, Georgia.

5. Plaintiff prays for a judgment on said attachment for twenty thousand dollars against the defendant, and also prays for a general judgment for twenty thousand dollars against the defendant on account of the case herein stated.

6. On the 18th day of February, 1910, and at about eleven o'clock p. m., plaintiff was in the employment of the defendant as engineer and was running a narrow-gauge engine at the steel plant of the defendant at Ensley, in Jefferson County, Alabama.

7. On the night aforesaid, while plaintiff was working with said engine, it developed that the brakes would not work satisfactorily and there was a nut under the cab which needed tightening. Ac-

cordingly plaintiff, as was his duty, reached under the cab
16 to tighten the nut and adjust the brake and had in his hands a wrench, and was in a reclining position when at this work necessarily.

8. Plaintiff had chocked and blocked his engine, that is, had put an obstruction under the wheels to prevent its moving; and moreover, had shut off the steam.

9. While plaintiff was down on the ground as aforesaid, the said engine, automatically and of its own accord and because of the defective condition herein explained and without any warning whatsoever, started moving backwards in spite of the chock which had been placed under the wheels, and moved several feet; and in doing so, knocked the plaintiff over and threw his right foot under the engine and the wheel passed over it, cutting it off, and plaintiff was otherwise greatly and permanently injured.

10. The engine which the defendant had furnished the plaintiff upon this occasion was not his regular engine, but was another engine which the defendant had furnished plaintiff, while the plaintiff's regular engine was in the shop. The said engine which injured the plaintiff was defective in numerous particulars.

11. The defendant failed to exercise its duty under the common law under which this court is brought in failing to furnish
17 plaintiff an instrumentality reasonable fit for the work.

The defendant furnished plaintiff an engine with a throttle which leaked and slipped, and which consequently automatically and without any motion of the hand, caused the steam to get into the cylinders of the engine and caused it to move. The said engine was an old one, to wit: over ten years old, and not only did said throttle leak, but the said engine would not stand with the reverse level at center as the valves did not work properly and did not perform their function, and plaintiff alleges that an engine in good condition should stand with the reverse lever at center.

Plaintiff alleges that an engine in good condition, as ordinary care requires it, should, by the closing of the valves when the throttle is closed, prevent the escape of any steam whatever; but the throttle in question did not fit tightly and consequently leaked and the said leakage enabled the steam to come through the valves and into the cylinders and caused the engine to move, even though the reverse lever was at center where plaintiff had left it. Said conditions were known to defendant in the exercise of ordinary care and it was the duty of defendant's machinist to repair the same, and said conditions had existed for over a week and
18 defendant's said machinist failed to repair the same, and any test—which ordinary care required, would have resulted in a disclosure of said conditions.

12. Plaintiff alleges that the defendant failed in its duty to furnish machinery equal in kind, to that in general use, and reasonably safe for all persons who operated it with ordinary care and diligence; and plaintiff avers that there were latent defects in said machinery and dangers incident to his employment unknown to plaintiff, of which the defendant knew or of which the defendant

should have known, and which the defendant failed to give plaintiff warning of, and plaintiff avers that he did not know of the defective conditions aforesaid and had not equal means with the defendant of knowing the same, and by the use of ordinary care could not have known thereof.

13. Plaintiff was permanently injured as follows: His right foot was cut off and he is rendered a cripple for life. He was mashed, bruised and injured in and about his head, neck, shoulders, body, back, abdomen, sides, limbs, joints and internal organs. His back and spine were twisted, bent and sprained and permanent spinal weakness caused. He has suffered and will continue to suffer great pain. His capacity to labor and earn money is totally and permanently destroyed. He is disfigured for life. All his time
19 up to filing this petition had been lost. He was 32 years of age and had an expectancy in life of 33.03 years. His average earnings were from $2.75 to $3.00 per day and would have been increased with time. His doctor's and medical bills are $300.00. For each and all the foregoing items of damage plaintiff sues.

Wherefore plaintiff prays that process may issue requiring the defendant to be and appear at the next term of this court to answer this complaint.

Second Count.

And for further cause of action and by way of an additional count, the petition of Wiley L. George, who is the plaintiff in the attachment above named, shows to the court the following case:

1. The defendant hereto is the Tennessee Coal, Iron and Railroad Company, which is a corporation and which operates various mines and furnaces.

2. The said defendant has endamaged plaintiff in the sum of twenty thousand ($20,000.00) dollars on account of the case which will now be stated.

3. On the 11th day of April, 1910, plaintiff sued out an attachment against the defendant before J. B. Ridley, a justice
20 of the peace in and for Fulton County, returnable to the May Term, 1910, of the City Court of Atlanta, to recover the sum of twenty thousand ($20,000.00) dollars.

4. Said attachment was on the 13th day of April, 1910, levied on the following described property of the defendant in the county of Bartow, Georgia, towit: Land lots 757, 758, 827, 828, 830, 831, 898, 899, 901 903, 969, 970, 974, 1044, 902, 1175, 1199, 1268, 1100, 1272, 118, 871, 972, 973 and 975, all of said land lots being in the Fourth District and Third Section of originally Cherokee, now Bartow County, George; and also land lots 862, 864, 937, 936 and 938, all of said land lots being in the Twenty-First District and Second Section of originally Cherokee, now Bartow County, Georgia.

5. Plaintiff prays for a judgment on said attachment for twenty thousand dollars against the defendant, and also prays for a gen-

eral judgment for twenty thousand dollars against the defendant on account of the case herein stated.

6. On the 18th day of February, 1910, and at about eleven o'clock p. m., plaintiff was in the employment of the defendant as engineer and was running a narrow gauge engine at the steel plant of the defendant at Ensley, in Jefferson County, Alabama.

7. On the night aforesaid, while plaintiff was working with
21 said engine, it developed that the brake would not work satisfactorily and that there was a nut under the cab which needed tightening. Accordingly plaintiff, as was his duty, reached under the cab to tighten the nut and adjust the brake and had in his hands a wrench and was in a reclining position when at this work necessarily.

8. Plaintiff had chocked and blocked his engine; that is, had put an obstruction under the wheels to prevent its moving; and moreover, had shut off the steam.

9. While plaintiff was down on the ground as aforesaid, the said engine, automatically and of its own accord and because of the defective condition herein explained and without any warning whatsoever, started moving backwards in spite of the chock which had been placed under the wheels, and moved several feet; and in doing so, knocked the plaintiff over and threw his right foot under the engine and the wheel passed over it, cutting it off, and plaintiff was otherwise greatly and permanently injured.

10. The engine which the defendant had furnished the plaintiff upon this occasion was not his regular engine, but was another engine which the defendant had furnished plaintiff, while the plaintiff's regular engine was in the shop. The said engine which injured the plaintiff was defective in numerous particulars.

22 11. The defendant failed to exercise its duty under the Alabama statute which will be hereinafter set forth, under which this *court* is brought. The throttle of said engine leaked steam and plaintiff alleges that with the reverse lever at center, and with the throttle shut off, the same still leaked steam, because the said throttle did not close up the valves sufficiently tight to keep the steam out of the cylinders. Plaintiff alleges that with an engine in good condition, as ordinary care requires it, the closing of the throttle with the reverse lever at center should close up the valves and shut off all escape of steam into the cylinders; but the engine in question did not do so, on the contrary it allowed steam to escape into the cylinders, and the engine was thus out of condition and had been so for upwards of a week prior to said accident, and it was defendant's duty to inspect the same and the duty of the defendant's machinist to inspect the same, and had said machinist properly inspected the said throttle and said valves and said cylinders, he would have discovered the fact that the same were not in good condition, and would have discovered the leakage of the steam.

12. Plaintiff shows that, because of the facts aforesaid, said injury was caused by reason of a defect in the condition of the way, works,

machinery, and plant connected with, and used in the business of the defendant.

23 13. Plaintiff further shows that, because of the facts aforesaid and because of the negligence of the defendant's machinist, who failed to properly inspect said engine and discover said defects, plaintiff was injured by reason of the negligence of a person in the employment of the defendant, to wit: said machinist who had superintendence intrusted to him, whilst in the exercise of such superintendence.

14. Plaintiff brings this count under the Alabama statute contained in section 3910 of the Alabama Code of 1907, which reads as follows: "Liability of master or employer to servant or employee for injuries: When a personal injury is received by a servant or employee in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employee, as if he were a stranger, and not engaged in such service or employment in the cases following:

1. When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in the business of, the master or employer.

2. When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence.

24 3. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer to whose orders or directions the servant or employee, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed.

4. When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf.

5. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive, engine, electric motor, switch, car, or train upon a railway, or of any part of the track of a railway.

The master or employer is not liable under this section, if the servant or employee knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless the master or employer, or such superior, already knew of such defect or negligence; nor is the master or employer

25 liable under sub-division 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the master or employee, or of some person in the service of the master or employer and instructed by him with

the duty of seeing that the ways, works, machinery or plant were in proper condition; provided, that in no event shall it be contributory negligence or an assumption of the risk on the part of a servant to remain in the employment of the master or employer after knowledge of the defect or negligence causing the injury, unless he be a servant whose duty it is to remedy the defect or who committed the negligent act causing the injury complained of."

15. Plaintiff was permanently injured as follows: His right foot was cut off and he is rendered a cripple for life, he was mashed, bruised and injured in and about his head, neck shoulders, body, back, abdomen, sides, limbs, joints, and internal organs. His back and spine were twisted, bent and sprained and permanent spinal weakness caused. He has suffered and will continue to suffer great pain. His capacity to labor and earn money is totally and permanently destroyed. He is disfigured for life. All his time up to the filing this petition has been lost. He was 32 years of age and had an expectancy in life of 33.03 years. His average earnings were from $2.75 to $3.00 per day and would have increased
26 with time. His doctor's and medical bills are $300.00. For each and all the foregoing items of damage plaintiff sues.

Wherefore plaintiff prays that process may issue requiring the defendant to be and appear at the next term of this court to answer this complaint.

REUBEN R. ARNOLD,
Pl'ff's Att'y.

Filed in office this the 6th day of May, 1910.
F. M. MYERS, *D. Cl'k.*

27 (*Answer of Defendant.*)

GEORGIA,
Fulton County:

The above stated case having been removed by petition in regular course from said City Court of Atlanta to the United States Circuit Court for the Northern District of Georgia, and having been by that court, on motion, remanded to said City Court of Atlanta, the defendant now comes, after such remand of said case, by its attorneys at law, Smith, Hammond and Smith, and for plea and answer to the declaration of the plaintiff therein shows:

First Count.

1. Defendant admits the allegations contained in paragraph one (1), three (3), four (4), and six (6) of the first count in the plaintiff's declaration.

2. Defendant denies the allegations contained in paragraphs two (2), eight (8), nine (9), ten (10), eleven (11) and twelve (12) of the first count in plaintiff's declaration.

3. Defendant respectfully shows to the Court that no answer to paragraph five (5) in the first count of plaintiff's declaration is required.

4. For lack of sufficient information this defendant can neither admit nor deny the allegations contained in paragraph seven (7) and thirteen (13) of the first count in said declaration.

28 5. For further plea and answer this defendant says that if the plaintiff was injured at the time and place alleged, by reason of the alleged defective condition of said engine, the accident was caused by the plaintiff's own negligence in placing himself under said engine, and otherwise failing to exercise his own skill and diligence to protect himself.

6. For further plea and answer this defendant says that, if the plaintiff was injured at the time and place alleged, by reason of the alleged defective condition of said engine, the plaintiff knew of said alleged defects in said engine and had means of knowing the same equal to those of this defendant.

7. For further plea and answer this defendant says that, if the plaintiff was injured at the time and place alleged, by reason of the defective condition of said engine, as alleged, if the plaintiff did not actually know of said defects in said engine, his means of knowledge were equal to those of this defendant, and by the exercise of ordinary care the plaintiff could have know- thereof, and was negligent in not knowing thereof.

Wherefore, having fully answered the first count of plaintiff's declaration, the defendant puts itself upon the country.

29 Second Count.

1. Defendant admits the allegations contained in paragraphs one (1), three (3), four (4), and six (6) of the second count in plaintiff's declaration.

2. Defendant denies the allegations contained in paragraphs two (2), eight (8), nine (9), ten (10), eleven (11), twelve (12) and thirteen (13) of the second count in plaintiff's declaration.

3. Defendant respectfully shows to the court that no answer to paragraph five (5) of the second count in plaintiff's declaration is required.

4. For lack of sufficient information, this defendant can neither admit nor deny the allegations contained in paragraph seven (7) and fifteen (15) of the second count in said declaration.

5. Answering paragraph fourteen (14) of the second count in plaintiff's declaration, this defendant says that if section 3910 of the Alabama Code of 1907 is therein correctly copied, the provisions thereof cannot be invoked in this court, because of the provisions of the law of Alabama as found in said code of Alabama of 1907 in section 6115, which provisions are in the following language, towit: "All actions brought under Sections 2486 and 3910 must be brought in a court of competent jurisdiction within the State of Alabama, and not elsewhere."

30 By reason whereof defendant says that in this court and in said case the law of Alabama as expressed in Section 3910 of the Code of 1907 is irrelevant and immaterial.

6. For further plea and answer this defendant says that if the plaintiff was injured at the time and place alleged, by reason of the alleged defective condition of said engine, the accident was caused

by the plaintiff's own negligence in placing himself under said engine and otherwise failing to exercise his own skill and diligence to protect himself.

7. For further plea and answer, this defendant says that if the plaintiff was injured at the time and place alleged, by reason of the alleged defective condition of said engine, the plaintiff knew of said alleged defects in said engine and had means of knowing the same equal to those of this defendant.

8. For further plea and answer this defendant says that if the plaintiff was injured at the time and place alleged, by reason of the alleged defective condition of said engine, if the plaintiff did not actually know of said alleged defects in said engine his means of knowledge were equal to those of this defendant, and by the exercise of ordinary care the plaintiff could have known thereof, and was negligent in not knowing thereof.

Wherefore, having fully answered the second count of plaintiff's declaration defendant puts itself upon the country.

SMITH, HAMMOND & SMITH,
Def't's Att'ys.

31 Filed in office this the 20th day of Feb., 1911.
T. C. MILLER, *D. Cl'k.*

(*Order Striking Par.* (5) *of Answer.*)

On motion of plaintiff, paragraph five (5) of the answer of defendant to the second count of plaintiff's declaration is stricken on the ground that the Courts of Georgia will not enforce the statute of Alabama found in Section 6115 of the Code of 1907 of that State in a suit brought in Georgia founded on the employers' liability act of Alabama found in Section 3910 of said Code of Alabama.

In open court, June 5th, 1911.

H. M. REID, *Judge.*

(*Order Striking First Count.*)

On motion *for* plaintiff's attorney in open court the first count in the declaration in said case is stricken and the cause will proceed on the second count alone.

In open court, June 6th, 1911.

H. M. REID, *Judge.*

32 (*Amended Answer.*)

GEORGIA,
Fulton County:

Now comes the defendant in the above stated case on this the 7th day of June, 1911, after the plaintiff had stricken the first count in the declaration in attachment in said case, which count was based on the common law rights and obligations of master and

servant, and said case was ordered to proceed under the second count thereof based upon the statute of Alabama as found in section 3910 of the Code of 1907 of said State, and respectfully shows to the court:

That the court should not proceed further in said case, for that under the statute of Alabama as found in said Code of 1907, section 6115, said code itself a single statute of the State of Alabama, it is provided that all actions under said section 3910 must be brought in a court of competent jurisdiction within the State of Alabama and not elsewhere.

This defendant says that the provisions of said section 6115 are an express restriction of the right of action under said Section 3910, and from limitations upon said right which this defendant is entitled to have the courts of Georgia and all other States respect and give full faith and credit to.

Wherefore defendant prays that said action be abated and
33 discontinued and dismissed at plaintiff's costs, for that to continue said cause of action under the statute of Alabama in this honorable court would be to deny to this defendant the equal protection of the laws as guaranteed to it under article 14, section 1 of the amendments to the constitution of the United States, and would amount to the enforcement of a law which abridges the privilege and immunity of this defendant as a citizen of the United States, contrary to the provision of said article 14, section 1 of the amendments to the constitution of the United States; and because to continue said case on said statutory cause of action given by the statutes of Alabama and restricted by said statutes to the courts of Alabama, in this court and in this cause, would be a denial so far as the rights of this defendant are concerned, of full faith and credit to said public acts of the State of Alabama in the State of Georgia, contrary to the provisions of article 4, section 1 of the constitution of the United States.

This defendant invokes the protection of the constitution of the United States in the articles and sections quoted, and prays thereunder for the dismissal of said case in said court for the reasons aforesaid, and prays judgment of the court accordingly.

SMITH, HAMMOND AND SMITH,
Att'ys for Def't.

34 (*Order Striking Plea.*)

Upon motion of the plaintiff, the foregoing plea is stricken on the ground that the courts of Georgia will not enforce the statute of Alabama found in section 6115 of the Code of 1907 of a State in a suit brought in Georgia founded on the Employers' Liability Act of Alabama found in section 3910 of said Code of Alabama.

In open court, this June 7th, 1911.

H. M. REID,
Judge City Court of Atlanta.

Filed in office this the 7th day of June, 1911.
T. C. MILLER, *D. Cl'k.*

35 (*Exceptions Pendente Lite.*)

GEORGIA,
Fulton County:

Be it remembered that on the trial of the above stated case in the City Court of Atlanta, on June 5, 6, and 7, 1911, the following proceedings were made, towit:

1. The plaintiff demurred orally and moved to strike the fifth paragraph of the plea of the defendant to the second count of plaintiff's declaration in attachment. Said motion was heard by the court and after argument of counsel sustained, and said paragraph five (5) of the answer and plea of the defendant to the second count of plaintiff's declaration was stricken on the ground that the courts of Georgia will not enforce the statutes of Alabama found in section 6115 of the Code of 1907 of that State, in a suit brought in Georgia founded on the employers' liability act of Alabama as shown in section 3910 of the Code of Alabama.

To which order and judgment of the court striking said paragraph five of said plea and answer the defendant then excepted and now excepts and says that the court erred in striking said plea as aforesaid. Said order and judgment was passed on the fifth day of June, 1911.

2. On the sixth day of June, 1911, plaintiff in open court withdrew the first count in his declaration in attachment; where-
36 upon the court ordered said first count in said declaration to be stricken, and that the cause should proceed on the second count alone.

Whereupon the defendant filed an amended plea in said case on the 7th day of June 1911, which amended plea the plaintiff moved to strike, and after argument of counsel the same was stricken by the court in an order thereon dated June 7, 1911, as appears of record, said plea being stricken after the said case was proceeding on the statute of Alabama alone, on the same grounds as when said case was proceeding on both the common law count and the count based on the employers' liability act of Alabama.

To which order and judgment of the court striking said amended plea said defendant then excepted and now excepts and says that the court erred in striking said amended plea on each and all of the grounds in said plea set forth; and that by said order striking said plea the court denied the said defendant its rights under the constitution of the United States, as in said plea fully set forth and invoked.

3. After the evidence and argument in said case was closed and the court had charged the jury, and the jury had retired and returned into court with its verdict, and while the jury was still in the jury box, and after said verdict had been received and
37 published by plaintiff's counsel, the defendant made the following request of the court in open court, in the presence of the jury, before the jury had dis*bur*sed and while they were still together in the jury box, and before said verdict had been

recorded, towit: "Having reason to suspect a practice with the juries in this county of arriving at verdicts in illegal ways, such as by agreements in advance to abide by the vote of less than the whole twelve as to whether the finding should be in favor of the plaintiff or the defendant, and by agreements in advance to fix the amount of recoveries as damages at the average arrived at by totaling the amounts expressed by each individual juror and dividing the sum by twelve and thus producing a quotient or speculative verdict, I respectfully request, on behalf of the defendant, that this jury be polled and each juror interrogated as to whether the verdict rendered is his individual verdict unaffected by any agreement among the jurors in advance of arriving at it, by which it was found to be in favor of the plaintiff, and independent of any agreement with the other jurors in advance of arriving at it, by which the amount of it was fixed by any calculation of averages of the estimates of individual jurors."

Said request and motion was then and there by the court overruled.

38 To which action of the court in refusing said request and denying said motion to inquire of each member of the jury in manner and form as therein requested, the defendant then excepted and now excepts, and assigns error thereon and says that the court erred in not holding the jury and propounding to it the questions set forth in said request.

To each and all of which orders, rulings and proceedings of the court on the trial of said case the defendant excepts pendente lite and files these its exceptions pendente lite during the same term of said court and within thirty days of said trial, as provided by law, and prays that the same may be allowed and certified and ordered filed as a part of the record in said case.

SMITH, HAMMOND AND SMITH,
Def't's Attorneys.

The foregoing exceptions pendente lite are allowed. The recitals of fact therein stated are true, and the same are ordered to be filed as a part of the record in said case.

This 8th day of June, 1911.

H. M. REID,
Judge City Court of Atlanta.

Filed in office this the 8th day of June, 1911.

T. C. MILLER, *D. Clerk.*

39 (*Verdict.*)

We, the Jury find for plaintiff $11,500.00.

This June 7th, 1911.

JOE LUPPERT, JR., *Foreman.*

(*Judgment.*)

The attachment in the case above stated having been levied on certain of the defendant's property and the defendant having come into court and filed a general appearance and answer to the merits and the jury having on the 7th day of June, 1911, rendered a verdict in favor of the plaintiff for the sum of eleven thousand five hundred ($11,500.00) dollars, it is now considered and adjudged by the court:

1. That the plaintiff have and recover a general judgment against the defendant, the Tennessee Coal Iron and Railroad Company, for the sum of eleven thousand five hundred ($11,500.00) dollars and all costs of this proceeding.

2. It is further considered and adjudged by the court that the plaintiff have and recover a special judgment in this case for said sum of eleven thousand five hundred dollars and costs against the property attached herein, towit: The following land in Bartow County, Georgia, land lots 757, 758, 827, 828, 830, 831, 898, 899, 901, 903, 969, 970, 974, 1044, part of lot 902 and land lots
40 1175, 1199, 1268, 1100, 1275, 118, 871, 972, 973 and part of land lot 975, all of the lots just described being in the 4th District and third section of originally Cherokee, now Bartow County, Georgia; and also land lots 862, 864, 937, 936 and 938, all of said land lots being in the 21st District and second section of originally Cherokee, now Bartow County, Georgia.

This 10th day of June, 1911.

R. R. ARNOLD,
Plaintiff's Att'y.

By the Court:
H. M. REID,
Judge City Court of Atlanta.

41 (*Extract from Brief of Evidence.*)

He then offered section 3910 of the Alabama Code of 1907, including all the subsections stated in the text, and as it is copied in the declaration it need not be repeated in this brief. Reference is hereby had to said declaration as showing the said Alabama law. Defendant objected on the same grounds as set up in its amended plea and said objections were overruled and statute admitted in evidence.

42 Case No. 3846.

Court of Appeals of Georgia.

TENNESSEE COAL, IRON & RAILROAD CO.
vs.
GEORGE.

By the COURT:

1. Section 906 of the Revised Statutes of the United States, which was enacted to carry into effect article 4, section 1, of the Federal

constitution, requires the courts of the several States to enforce any transitory cause of action created by a statute of a sister State, not opposed to the settled policy of the State wherein the cause of action is sought to be enforced. But neither the constitution of the United States nor any act of Congress passed in pursuance thereof authorizes the legislature of one State to deny to one having a transitory cause of action, originating in that State under one of its statutes, the right to appeal to the courts of another State for the enforcement of his cause of action.

2. In Civil cases it is discretionary with the trial judge whether he will permit the jury to be polled; and the reviewing court will interfere only in a clear case of abuse of discretion. There was none such in the present case.

43 3. Under the facts of this case it was not error, requiring the grant of a new trial, to permit the plaintiff to testify that there was nothing he could have done which he did not do to prevent the injuries he received.

The plaintiff brought his action by attachment in the city court of Atlanta, claiming damages for personal injuries alleged to have been received by him while in the defendant's employment as a locomotive engineer in the State of Alabama. The plaintiff pleaded, as the basis of his right to recover, § 3910 of the Code of Alabama of 1907. That section provides that when a personal injury is received by a servant in the service or business of his master, the master is liable in damages to the servant as if he were a stranger and not engaged in the service of the master, in several named cases, among which are the following: (1) when the injury is caused by reason of any defect in the ways, works, machinery, or plant connected with, or used in the business of the master; (2) when the injury is caused by reason of the negligence of any person in the employment of the master who has any superintendence in-

44 trusted to him while in the exercise of such superintendence; (3) when such injury is caused by the negligence of any co-employee of the master to whose orders or directions the injured servant was at the time of the injury bound to conform, and did conform, if such injuries resulted from obedience to such orders; (4) when the injury is caused by reason of the act or omission of any servant in the service or employment of the master, done or made in obedience to the rules or regulations of the master, or in obedience to particular instructions given by any person delegated with the authority of the master; (5) when the injury is caused by reason of the negligence of any person in the employment of the master who has charge or control of any signal, locomotive, or other named appliance of the master. It is further provided in the section that the master is not liable if the servant knew of the defect causing the injury and failed in a reasonable time to give information thereof to the master or to some person superior to himself, unless the master or such superior already knew of the defect; nor is the master liable under subdivision 1 of the section, unless the defect arose from, or had not been discovered or remedied owing to, the negligence of the master or of some person in the service of the

master and intrusted by him with the duty of seeing that the ways, works, and other named applicances were in proper condition;
45 provided that in no event shall it be contributory negligence, or an assumption of the risk on the part of a servant, to remain in the employment of the master after knowledge of the defect or negligence causing the injury, unless he be a servant whose duty it is to remedy the defect, or who committed the negligent act causing the injury complained of.

The plaintiff was injured while undertaking to repair a locomotive, and on account of certain defects in the locomotive which are set forth in detail in the petition. In defense to the action the defendant pleaded, among other things, section 6115 of the Code of Alabama of 1907, which is in the following language: "All actions brought under sections 2486 and 3910 must be brought in a court of competent jurisdiction within the State of Alabama and not elsewhere." Upon motion of the plaintiff the court struck this plea, and this is the primary error assigned in the record. A verdict in favor of the plaintiff was returned, and the defendant's motion for a new trial was overruled.

In this court the plaintiff in error expressly abandoned those grounds of its motion in which complaint is made that the verdict is not authorized by the evidence and is excessive. The only ground insisted upon here is the overruling of its objection to the
46 following question propounded by the plaintiff's attorney to the plaintiff while testifying in his own behalf: "Was there anything else you could have done to keep the engine still when you were under it?" The objection was that the question called for an expresion of an opinion on the part of the witness, in reference to a matter which was solely for decision by the jury. The witness answered the question as follows: "Nothing on earth that I know of." There is a further assignment of error in the bill of exceptions as follows: After the verdict of the jury had been announced and before the jury were dispersed and the verdict had been recorded, defendant's counsel made the following statement and motion: "Having reason to suspect a practice with the juries in this county of arriving at verdicts in illegal ways, such as by agreements in advance to abide by the vote of less than the whole twelve as to whether the finding should be in favor of the plaintiff or the defendant, and by agreements in advance to fix the amount of recoveries as damages as the average arrived at by totaling the amounts expressed by each individual juror and dividing the sum by twelve, and thus producing a quotient or speculative verdict. I respectfully request, on behalf of the defendant, that this jury be polled, and each juror interrogated as to whether the verdict rendered is his individual verdict, unaffected by any agreement among the
47 jurors in advance of arriving at it, by which it was found to be in favor of the plaintiff, and independent of any agreement with the other jurors in advance of arriving at it, by which the amount of it was fixed by any calculation of averages of the estimates of individual jurors." The court overruled this motion and declined to propound the questions suggested by counsel, though

it seems from a statement in the brief of counsel for the plaintiff in error, that the court was willing to permit the usual question to be propounded to each of the jurors, "is this your verdict?"

POTTLE, *J.* (after stating the foregoing facts):

1. Both in the trial court and in this court the plaintiff in error, in support of its plea that the action could not be maintained, because of the provisions of § 6115 of the Code of Alabama of 1907, invoked article 4, section 1 of the constitution of the United States, which is in the following language: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and the Congress may, by general laws, prescribe the manner in which such acts, records, and pro-
48 ceedings shall be proved, and the effects thereof." Section 6115 was adopted with the Code of 1907 in solido, some time after the passage of the act contained in § 3910, and in the argument for the defendant in error some importance is attached to this fact. We prefer, however, to deal with the point as if the restriction of the right to sue the courts of competent jurisdiction in Alabama had been part and parcel of the statute creating the cause of action. It is broadly contended by counsel for the plaintiff in error that the full faith and credit clause of the Federal constitution would compel the courts of Georgia to give effect to the limitations contained in § 6115, and to refuse to take cognizance of a suit based upon the provisions of § 3910. In other words, it is insisted that the State of Alabama has the power to create a right and limit its enforcement to the courts of that State. Counsel for the defendant in error reply that the laws of Alabama can have no extra-territorial effect; that while any condition or limitation prescribed by the legislature of that State which goes merely to the manner in which the right shall be exercised is binding upon the courts of that State, yet that all conditions or limitations which affect merely the remedy have no force beyond the limits of the State, but are matters as to which the lex fori controls.

49 It is, of course, well settled that the courts of one State will enforce any transitory cause of action arising in another State which is not opposed to the settled policy of the State wherein it is sought to enforce the right. The question, therefore, presented for our determination is whether or not the legislature of one State can create a statutory right which gives rise to a transitory cause of action, and at the same time localize the right so as to prevent its enforcement beyond the limits of the State. In the early history of this country Congress passed acts, in execution of the constitutional grant of power above quoted, which provided that the acts of legislatures of the several States should have such faith and credit given to them in every State of the United States as they have by law and usage in the courts of the State in which they were enacted. 1 Stat. at Large, chap. 122, 11; U. S. Compilation of Stats. 1901, p. 677. Does the provision of this act of Congress, construed in connection with section 1 of article 4 of the Federal constitution, compel the courts of Georgia to give effect to § 6115 of the Code of

Alabama, denying to a person injured in the State of Alabama, on account of negligence of one domiciled in that State, the right to maintain an action under the provision of § 3190 of the code of that State in any court other than the courts of competent
50 jurisdiction of that State? This court has twice had under consideration the identical question presented by this assignment of error. In Southern Railway Co. v. Decker, 5 Ga. App. 21, 34, in referring to § 6115 of the Code of Alabama of 1907, it was said: "Even if this statute had been in force at the time the suit was instituted, it would have been the duty of the courts of this State to disregard it. Our own sense of justice, subject to the guidance of the lawmaking power of this State, determines solely and alone what laws, domestic or foreign, we will enforce; and this discretion is subject to neither limitation nor extension by the legislature of any other State." This language was quoted approvingly in Southern Railway Co. v. Robertson, 7 Ga. App. 154, 162. In neither of the cases just cited was the question directly involved, and we are called upon now for the first time to make an authoritative ruling upon the point presented. Prior to the passage of the act of Congress in execution of the full faith and credit clause of the Federal constitution, the question as to whether laws of a foreign State would be enforced by the courts of another State was determined largely as a matter of comity between the States. As was said by Judge Nisbet in Cox v. Adams, 2 Ga. 164: "The laws of a country, as a general principle, have no binding force
51 beyond its territorial limits. Their authority is admitted in other States, not ex proprio vigore, but ex comitate; not on account of any inherent force in the law itself beyond the limits of the State which enacts it, but because of the comity of nations. Each State has the unquestioned right to legislate upon the rights and objections of its own citizens, according to its own views of right and expediency. So, also, every independent State will judge for itself how far it shall or shall not admit the force of foreign laws within its own territory. These principles, as well as those we shall further declare in this opinion, are applicable to the States of our own Union, so far as they are not modified by our peculiar system—so far as the constitution of the Union does not limit, restrain or alter them."

Generally speaking, any transitory cause of action authorized by the law of one State would by comity be enforced by the courts of another, if not opposed to the settled policy of the latter State. Since the passage of the act of Congress, the question has become one upon which the decisions of the Supreme Court of the United States are binding upon the several States; and the courts of this State are bound to yield respect and obedience to an authoritative ruling of the Supreme Court of the United States upon the questions as to what effect should be given to an act of the legis-
52 lature of one State when a right thereunder is set up or claimed in the courts of another State. In our opinion the question is settled authoritatively against the contention of the plaintiff in error by the decision of the Supreme Court of the United

States in the case of Atchison R. Co. v. Sowers, 213 U. S. 54 (53 L. ed. 695). In that case a statute of the territory of New Mexico was involved. That statute provided: "Whereas, it has become customary for persons claiming damages for personal injuries received in this territory to institute and maintain suits for the recovery thereof in other States and territories, to the increased annoyance and manifest injury and oppression of the business interests of this territory, and the derogation of the dignity of the courts thereof," it was enacted that after the passage of that act no civil liability under either the common law or any statute of the territory, on the part of any person or corporation, for personal injuries or death caused by such person or corporation in the territory, should be enforced in any court other than the district court of the territory in and for the county of the territory where the claimant or the person against whom the claim was asserted resided, or, if a corporation, in the county in which the corporation had its principal place of business. It was further prescribed by the act that there
53 should be certain conditions precedent to suit, such as service upon the person or corporation against whom the damages were claimed, within ninety days after the injury and thirty days before the commencement of the suit, of an affidavit by the claimant, stating his name and address and the name of the person receiving the injuries, the character and extent of the injuries, the way or manner in which the injuries were caused, and the names and addresses of all the witnesses to the happening of the facts causing the injuries; also that all of the conditions thereinbefore mentioned, including the bringing of the action within one year in a court within the territory, must be complied with, and "that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which the right to recover can exist for such injuries," except as otherwise provided in the act. An action was brought in one of the courts of Texas by a person, who had sustained personal injuries in the territory of New Mexico, and the statute of New Mexico, above referred to, was pleaded as a defense to the action. The Court of Civil Appeals of Texas refused to sustain the defense, and held, in substance, that while all the conditions precedent to suit, as prescribed by the act of New Mexico, in reference to giving of notice, furnishing
54 the list of the witnesses, making an affidavit, etc., would be enforced by the courts of Texas, those courts were not bound to recognize and respect an act of the territory of New Mexico which limited the right to suit to the courts of that territory. In the course of the opinion that court said: "The State of Texas is bound, under section 1, article 4 of the constitution of the Union States, to give full faith and credit to the public acts, records, and judicial proceedings of every other State, but it is not required to recognize a statute of any State that seeks to fix the jurisdiction of its courts and prevent the citizens of other States from using its courts, if they so desire, in the enforcement of their rights. The jurisdiction of our courts must and will be prescribed by the constitutional and legislative authority of our State, and not by that of any other

State. A law attempting such interference is null and void, and, as such, does not come within the constitutional provision aforementioned. There is nothing in the contention that a void statute is binding on the courts of Texas until the territorial courts declare the law invalid. In the very nature of things the question will probably never be presented to the territorial courts, and, in the next place, their decision could not give vitality to a void statute respecting the jurisdiction of the courts of this State. We
55 do not question the authority of the laws of New Mexico so far as they apply to its own affairs, but we repudiate them when they attempt to regulate the affairs of other States. The right of injured parties to recover damages from the negligent inflicter of the injuries is recognized in New Mexico, although recognition carries with it burdensome and vexatious conditions, of which, however, if its citizenship is willing to endure them, no one is in a position to complain. But the citizens of other States cannot be forced into its courts by a legislative provision that such suits can be instituted and prosecuted in the courts of no other State." 99 S. W. 192. The decision of the Court of Civil Appeals of Texas was carried to the Supreme Court of the United States upon writ of error, and that court held that a Federal question was presented by the writ of error, and announced its ruling upon the constitutional question presented as follows: "The full faith and credit demanded by U. S. Rev. Stat. §906, U. S. Comp. Stat. 1901, p. 678, is given by the Texas courts to N. M. act of March 11, 1903, providing that an action for personal injuries received in that territory will not lie unless certain requirements as to the making of an affidavit and the bringing of suit within a specified time are observed, where a recovery is permitted in those courts subject to such restric-
56 tions, although the statute also undertakes to make the suit maintainable only in the district court of the territory." The view entertained by that court will be seen by an inspection of the opinion of the majority, written by Mr. Justice Day, from which the following excerpts are taken: "It is, then, the settled law of this court that in such statutory actions the law of the place is to govern in enforcing the right in another jurisdiction; but such actions may be sustained in other jurisdictions when not inconsistent with any local policy of the State where the suit is brought." " 'Each State may, subject to the restrictions of the Federal constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and, specifically, how far it will, having jurisdiction of the parties, entertain in its courts transitory actions, where the cause of action has arisen outside its borders.' St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 285 (52 L. ed. 1061, 1064, 28 Sup. Ct. Rep. 616). The territory of New Mexico has a right to pass laws regulating recovery for injuries incurred within the territory. Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284 (51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 A. & E. Ann. Cas. 87). It has a right, under §906 of the Revised Statutes,

to require other States, when suits are therein brought to
57 recover for an injury incurred within the territory, to observe the conditions imposed upon such causes of action, although otherwise controlled by common-law principles. But, when it is shown that the court in the other jurisdiction observed such conditions, and that a recovery was permitted after such conditions had been complied with, the jurisdiction thus invoked is not defeated because of the provision of the statute referred to." Mr. Justice Holmes, with whom concurred Mr. Justice McKenna, dissented, holding that inasmuch as the territory of New Mexico could have refused to create the right of action altogether if it had seen fit when it adopted the common-law liability upon certain conditions precedent, one of which was that the party injured should sue in the territory, this condition was binding and no suit could be maintained in the courts of any other State.

Counsel for the plaintiff in error argue that the distinction between the case of Atchison R. Co. v. Sowers, supra, and the one now under consideration is that in the former case the substantive cause of action existed at common law and did not depend upon statute. They contend that while a State would not have the right to restrict to its own courts the enforcement of a common-law liability, it does have the right to so limit a liability created by its statute; in other words, that as the State need not have created the liability,
58 it has a right to prescribe the forum in which the cause of action should be enforced. It seems to us that this distinction cannot be sustained, and that the purpose and intent of the decision of the United States Supreme Court was to hold broadly that the courts of each State have a right to determine for themselves subject to the limitations of the Federal constitution and the Acts of Congress passed in pursuance thereof what transitory causes of action they will enforce; and that it is beyond the power of the State creating the cause of action to deny the right to enforce it in the courts of another State. It seems to us inaccurate to say that the limitation sought to be imposed by the legislature of Alabama is a condition affixed to the right created by the statute. It is really a limitation or restriction which goes merely to the remedy. Remedy for the enforcement of a right embraces not only the procedure for its enforcement, but also the forum in which it shall be enforced. The forum in which a right must be enforced is no part of the right. A right might be created and no tribunal be erected in which to enforce it. But the right would none the less exist. It would simply be inoperative or remain in abeyance until a tribunal was invested with jurisdiction to enforce it. It is much like the case where an act is prohibited by law, but no penalty is prescribed.
One who commits the act violates the law, even though no
59 penalty be attached to the violation. The constitution of the United States requires a State to deliver up a fugitive from justice from another State. The fact that no method is prescribed for compelling obedience to this mandate does not destroy or affect the right of one State to demand the surrender of the fugitive, or the obligation of the State to which the fugitive has fled to deliver him up. The right will be enforced in the courts of Georgia in

strict accordance with the statute of Alabama, and every condition of that statute which relates to the right will be enforced by our courts. In other words, when suit is brought in one of the Georgia courts under the Alabama statute, the Georgia court is substituted for the Alabama tribunal, and will enforce the right in the same way, according to the same principles and to the same effect, as it would be enforced in the State of Alabama. More than this, we will construe the statute as it is construed by the highest court of the State of Alabama, and we will give due effect to all of the laws of Alabama which affect the right created by the statute. The statute of Alabama is the source of the right on which the jurisdiction acts, but it is not the source of the jurisdiction itself. We look to the act to determine the right, but we refuse to look to the law of Alabama to determine what rights the courts of this State will en-
60 force, or to fix the jurisdiction of its tribunals. Cases are tried in Alabama upon the settled principles of the common law, and they are tried in Georgia upon the same principles and substantially according to the same procedure. While the common law is presumed to be of force in nearly all of the American States, there is no such thing as a common-law liability, except as such liability may be recognized by statute. While the right may be founded upon the common law, and the origin of the right may be derived from the common law, it is none the less statutory, since the common law has no force and effect in the several States except as it may have been adopted by statute. Alabama has as much right to withhold its sanction of a right existing at common law as it has to withhold legislative recognition of a new right, not existing at common law. It is true that the right created by the Alabama statute now under consideration did exist at common law, although there are certain statutory incidents and qualifications which were not recognized at common law. But without reference to this, even if the right itself had been one which did not exist at common law, if the statute creates a transitory cause of action not opposed to the settled policy of this State, the courts of Georgia will not close *its* doors to one claiming a right under the statute, notwithstanding the amendment to the law, which seeks to confine the right to
61 sue to the courts of competent jurisdiction within the State of Alabama. Our opinion is that the decision of the Supreme Court of the United States above referred to, is absolutely controlling on the question presented and that the trial court properly declined to sustain the defense based upon the provisions of §6115 of the Code of Alabama of 1907.

2. In criminal cases the defendant has an absolute right to poll the jury, but in civil cases it is discretionary with the court whether the losing party shall be permitted to exercise this privilege. Bell v. Hutchings, 86 Ga. 562; Black v. Thornton, 31 Ga. 641; Smith v. Mitchell, 6 Ga. 458; Rutland v. Hathorn, 36 Ga. 380. Upon authority of these decisions, even if the defendant had requested the presiding judge to permit the polling of the jury in the usual way by simply asking each juror if the verdict returned was his verdict, it would have been discretionary with the judge to permit or refuse the request. It may be seriously doubted if the trial judge had the

right to propound to the jury the question suggested by the counsel for the defendant even if he had been disposed to do so. The request was based upon an ex parte statement of counsel that he had reason to suspect that the juries of Fulton county were in the habit of returning what is termed a quotient verdict in suits for
62 damages. There was no suggestion that this particular jury had adopted this course in arriving at their verdict, or that there was any irregularity in the manner in which the verdict had been reached. In addition to this, the practical effect of an answer from the jurors as to the manner in which the verdict had been arrived at would have been to permit them to impeach their own verdict. No juror would have been allowed to disclose to the court that the verdict had been arrived at in an illegal manner, and if he had been permitted to answer that there had been an agreement among the jurors in advance of arriving at the verdict, as to the manner in which it was to be determined, and that the agreement was that the verdict was to be reached by a calculation of the average of the estimates of individual jurors, this would have been in effect to allow the juror to impeach his own verdict. The usual way of polling the jury is to ask each individual juror whether he consented to the verdict, or, as it is usually put, "Is this your verdict?" If he says it is, and that he consented to it, the law closes his mouth as to the manner in which the verdict was arrived at, and its irregularities must be shown to the court by other evidence than that derived from the jurors themselves. If he answers that the verdict is not his, and he did not consent to it, he should not be interrogated as to his reasons for not consenting, and the verdict should
63 not be received. We know no precedent in this State which would have justified the trial judge in granting the request of counsel for the defendant, and certainly it was no abuse of discretion to refuse to do so.

3. Nor do we think the assignment of error which complains of the admission of testimony of the plaintiff constituted any sufficient reason for granting a new trial. Plaintiff had testified in detail as to his conduct in reference to the transaction under investigation, and it necessarily follows, from his testimony, that there was nothing else he could have done to have kept the engine still while he was under it. All of the circumstances indicated that it was through no fault of his that the engine moved; and, while it was a question for the jury, upon the defense presented, as to whether or not the plaintiff was at fault, and whether or not the moving of the engine was due to his own negligence, still, under the facts testified to by the plaintiff, the jury would have been bound to find that he had done everything which he could have done to prevent the engine from moving. It was altogether harmless, therefore, to permit the plaintiff to testify in the language complained of. We find no error in the record, and the judgment overruling the motion for a new trial must be affirmed.

Judgment affirmed.

64 Court of Appeals of the State of Georgia.

ATLANTA, *June* 5, 1912.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

TENNESSEE COAL, IRON & R. Co.
v.
WILEY GEORGE.

This case came before this court upon a writ of error from the city court of Atlanta; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Bill of costs, $10.00.

65 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Court of Appeals of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, between Tennessee Coal, Iron & Railroad Company and Wiley George, a manifest error hath happened, to the great damage of the said Tennessee Coal, Iron & Railroad Company, as by its complaint appears. We being willing that error, if any hath been should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at Washington, D. C., within thirty days from the date hereof, in the said United States Supreme Court, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 13th day of June, in the year of our Lord one thousand nine hundred and twelve.

O. C. FULLER,
Clerk of the District Court of the United States for the Northern District of Georgia.

Allowed by

[Seal U. S. District Court, N. D. Georgia.]

BENJAMIN H. HILL,
Chief Justice Court of Appeals of Georgia.

Filed in the Clerk's office of the Court of Appeals of the State of Georgia, this 13 day of June, 1912.

LOGAN BLECKLEY, *Clerk.*

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Wiley George, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the State of Georgia, wherein Tennessee Coal, Iron & Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this the 13th day of June, 1912.

BENJAMIN H. HILL,
Chief Justice of the Court of Appeals of the State of Georgia.

Copy of the within citation received, this the 13th day of June, at my office in the city of Atlanta, Georgia; all other and further service waived.

REUBEN R. ARNOLD,
Attorney for Wiley George, Defendant in Error.

P. O. Address: Gould B'ld'g, Atlanta, Ga.

Filed in office June 13, 1912.

LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

67 Court of Appeals of Georgia.

No. 3846.

TENNESSEE COAL, IRON & RAILROAD COMPANY, Plaintiff in Error,
v.
WILEY GEORGE, Defendant in Error.

To the Honorable Benjamin H. Hill, Chief Justice of the Court of Appeals of the State of Georgia:

The petition of the Tennessee Coal, Iron & Railroad Company respectfully shows:

That heretofore, towit, on the 5th day of June 1911, there was tried in the City Court of Atlanta, County of Fulton, and State of Georgia, a case in which Wiley George was plaintiff and your peti-

tioner was the defendant. The declaration of the plaintiff in said case was a petition for the recovery of damages for personal injuries received by the plaintiff, said damages being laid in the sum of twenty thousand ($20,000.00) dollars, and the said personal injuries being alleged by the plaintiff to have been the result of the defendant's negligence.

Said case was originally stated in two counts, the first count being based upon the common law liability of the defendant to the plaintiff under allegations charging that the defendant failed to
68 exercise its duty under the common law under which this count is brought in failing to furnish the plaintiff an instrumentality fit for the work, and that the defendant failed in its duty to furnish machinery equal in kind to that in general use, and reasonably safe for all persons who operated it with ordinary care and diligence; and that there were latent defects in said machinery and danger incident to his employment unknown to plaintiff, of which the defendant knew, or of which the defendant should have known, and which the defendant failed to give plaintiff warning of, and plaintiff did not know of the defective conditions aforesaid and had not equal means with the defendant of knowing the same, and by the use of ordinary care could not have known thereof.

The second count was based upon the alleged negligence of the defendant to the plaintiff, its employee, under the terms and provisions of the statute of the State of Alabama embraced in section 3910 of the Code of Alabama of 1907, which was set forth in extenso in the second count of plaintiff's petition.

The Tennessee Coal, Iron & Railroad Company answered said declaration and averred, in paragraph five (5) thereof, that the provisions of section 3910 of the Alabama Code could not be invoked in the City Court of Atlanta because of the provisions of section 6115 of said Code, viz: "All actions brought under sections
69 2486 and 3910 must be brought in a court of competent jurisdiction within the State of Alabama and not elsewhere," by reason whereof the law as expressed in section 3910 of said Code was irrelevant and immaterial in said case. Said paragraph of said answer was on motion of the plaintiff in the trial court stricken by said court, as appears of record.

Upon the trial of said case in said City Court of Atlanta, the plaintiff in said court dismissed the first count of said declaration, and the case proceeded under order of said court to verdict and judgment based on the statute above set out as section 3910 of the Code of Alabama, known as the employers' liability act of the State of Alabama.

Whereupon defendant filed an amendment to its defense by plea to said case in which it set up that actions under the said statute embraced in said section 3910 of the Code were, by the express provisions of the statute of said State, found in section 6115 of said Code said Code itself being a single statute of the State of Alabama,limited to courts of competent jurisdiction within the State of Alabama and could not be brought elsewhere; that this limitation upon the invocation of rights of action under the said employers' liability act

of the State of Alabama was entitled to full faith and credit;
70 that a refusal to so respect and give full faith and credit to such limitation of said right of action under said employers' liability act of the State of Alabama was to deny, so far as the defendant in said City Court of Atlanta was concerned, full faith and credit to the public acts of Alabama in the State of Georgia, contrary to the provisions of Article 4, section 1, of the Constitution of the United States.

On motion of the plaintiff in said City Court of Atlanta said plea was stricken by the court on the express ground that the courts of Georgia will not enforce the Statute of Alabama found in section 6115 of the Code of 1907 of that State in a suit brought in Georgia founded on the employers' liability act of Alabama, found in section 3910 of said Code of Alabama.

Said case proceeded to verdict and judgment in said City Court of Atlanta, said verdict being in favor of the plaintiff, Wiley George, in the sum of Eleven Thousand, Five Hundred ($11,500.00) Dollars and costs of suit, and judgment thereon was rendered accordingly. Thereafter, in regular course motion for new trial having been overruled, bill of exceptions and writ of error were taken to the Court of Appeals of the State of Georgia, and said case on said bill of exceptions and writ of error and its accompanying record came on to be heard and was argued in said Court of Appeals on the ninth day of February, 1912, and on the 5th day of June, 1912, the said
71 Court of Appeals of the State of Georgia rendered its final judgment therein affirming the judgment of the court below, namely the City Court of Atlanta aforesaid.

Petitioner further shows that the said judgment of the said Court of Appeals of the State of Georgia was and is a final judgment of the highest court of the State of Georgia in which a decision in said suit could or can be had.

Petitioner further shows that a Federal question was made in said case, towit, as hereinbefore stated, and that said verdict and said judgment of said City Court of Atlanta, affirmed by the Court of Appeals of the State of Georgia as aforesaid, was repugnant to and in conflict with the Constitution of the United States and the provisions of Article 4, section 1, thereof, and a decision of said Federal question was necessary to the final judgment rendered in said Court of Appeals of the State of Georgia.

Wherefore, your petitioner presents herewith an exemplified transcript of the record in the Court of Appeals of the State of Georgia in said case, and prays that a writ of error to said Court of Appeals be allowed; that citation be granted and signed; that suitable bond, to be presented herewith, be approved and that upon compliance with the terms of the statutes made and provided said bond and writ of error may operate as a supersedeas, that the errors complained of may be reviewed and reversed in the Supreme
72 Court of the United States, as provided by law.

TENNESSEE COAL, IRON & RAILROAD COMPANY,
By ALEX W. SMITH, *Its Attorney at Law.*

P. O. Address: 509 Grant B'ld'g, Atlanta, Ga.

The writ of error as prayed for in the foregoing petition is here-y allowed, this the 13th day of June 1912. The writ of error to operate as supersedeas, and the bond for that purpose is fixed at One Thousand ($1,000.00) Dollars.

Dated at Atlanta, Georgia, this the 13 day of June, 1912.

BENJAMIN H. HILL,
Chief Justice of the Court of Appeals of the State of Georgia.

Filed in my office, this the 13 day of June, 1912.
LOGAN BLECKLEY,
Clerk Court of Appeals of the State of Georgia.

73 Court of Appeals of Georgia.

No. 3846.

TENNESSEE COAL, IRON & RAILROAD COMPANY, Plaintiff in Error,
v.
WILEY GEORGE, Defendant in Error.

The above entitled matter coming on to be heard upon the petition of the plaintiff in error therein for writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Georgia, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter,

It is ordered that the writ of error be, and is hereby allowed to this Court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is, hereby approved.

This June 13th, 1912.

BENJAMIN H. HILL,
Chief Justice of the Court of Appeals of the State of Georgia.

Filed in office June 13, 1912.
LOGAN BLECKLEY, *Clerk C. A., Ga.*

74 Court of Appeals of Georgia.

No. 3486.

TENNESSEE COAL, IRON & RAILROAD COMPANY, Plaintiff in Error,
v.
WILEY GEORGE, Defendant in Error.

Bond.

Know all men by these presents, that we, Tennessee Coal, Iron & Railroad Company, as principal, and National Surety Company

of New York, as sureties, are held and firmly bound unto Wiley George in the sum of One Thousand Dollars, to be paid to the said obligee, his heirs, executors and administrators; to the payment of which well and truly to be made, we bind ourselves and our successors by these presents.

Sealed with our seals and dated this the 13th day of June, A. D. 1912.

Whereas the above-named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Court of Appeals ofthe State of Georgia.

Now therefore, the conditions of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail
75 to made good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

TENNESSE COAL, IRON & RAILROAD COMPANY,
By ALEX. W. SMITH,
Its Attorney at Law, Principal. [L. S.]
NATIONAL SURETY CO., [SEAL.]
By BOYD PERRY, *Attorney in Fact, Sureties.*

I hereby approve the foregoing bond and sureties, this the 13th day of June, 1912.

BENJAMIN H. HILL,
Chief Justice of the Court of Appeals of the State of Georgia.

Filed in office June 13, 1912.
LOGAN BLECKLEY, *Clerk C. A., Ga.*

76 TENNESSEE COAL, IRON & RAILROAD COMPANY, Plaintiff in Error,
v.
WILEY GEORGE, Defendant in Error.

Assignment of Errors.

Now comes the said plaintiff in error, and respectfully submits that in the record, proceedings, decision, and final judgment of the Court of Appeals of the State of Georgia, in the above entitled matter, there is manifest error in this, towit:

First. The sole question of law brought up in this record for review by the Supreme Court of the United States is stated as follows: The plaintiff in the trial court in his suit for personal injuries, as finally amended, proceeded under a part of the statutes of the State of Alabama found in section 3910 of the Code of Alabama of the year 1907, and commonly called the Employers' Liability Act of the State of Alabama, his action being brought in the City Court of Atlanta, Fulton County, Georgia. The defendant in said trial

court filed a plea to the suit as thus amended, setting up and relying upon another part of the statutes of the State of Alabama found in said Code of 1907 and known as section 6115, said Code itself being a single Act of the State of Alabama, said section 6115 providing that "All actions brought under section- 2486 and 3910 must be brought in a court of competent jurisdiction within the State
77 of Alabama, and not elsewhere." The defendant in said trial court had previously set up said section 6115 in answer to that paragraph of the second count of plaintiff's original declaration, setting up section 3910 of said Code, and said paragraph of defendant's answer was on motion stricken by the court and exception duly taken. Said plea to the declaration as amended was demurred to by the plaintiff in the trial court and was by order of said court stricken, and exception duly taken. Said plea of the defendant set up said section 6115 of the Code of the State of Alabama in defense of said action based upon section 3910 of the Code of Alabama, and contained the following language: "This defendant says that the provisions of said section 6115 are an express restriction of the right of action under said section 3910 and form limitations upon said right which this defendant is entitled to have the courts of Georgia and all other States respect and give full faith and credit to. Whereupon defendant prays that said action be abated and discontinued and dismissed at plaintiff's cost, for that to continue said cause of action under the statute of Alabama in this honorable court would be * * * a denial, so far as the rights of the defendant are concerned, of full faith and credit to said public acts of the State of Alabama in the State of Georgia,
78 contrary to the provisions of Article 4, section 1 of the Constitution of the United States. This defendant invokes the protection of the Constitution of the United States in the article and section quoted, and prays thereunder for the dismissal of said case in said court for the reasons aforesaid, and prays judgment of the court accordingly." In the judgment of the trial court striking said plea the following language appears: "The foregoing plea is stricken on the ground that the courts of Georgia will not enforce the Statute of Alabama found in section 6115 of the Code of 1907 of said State in a suit brought in Georgia founded on the Employers' Liability Act of Alabama found in section 3910 of said Code of Alabama." Said judgment of the trial court striking said plea of the defendant therein as aforesaid was affirmed by the Court of Appeals of the State of Georgia, thereby becoming a final judgment of the court of last resort in the State of Georgia. And plaintiff in error now assigns error on said final judgment and says that the court erred in not reversing said judgment of the City Court of Atlanta and directing that said plea invoking the protection of the Constitution of the United States in the article and section referred to should be sustaincd.

Second. Plaintiff in error assigns error on the judgment of said court aforesaid, and says that said judgment is repugnant to and in conflict with Article 4, section 1 of the Constitution of the
79 United States in that it denies full faith and credit to a public act of the State of Alabama in the courts of the State of

Georgia, to the injury of this plaintiff in error, and that said decision of said Federal question was necessary to the judgment rendered.

Third. The court erred in holding that neither the Constitution of the United States nor any act of Congress passed in pursuance thereof authorizes the legislature of one State to deny to one having a transitory cause of action originating in that State under one of its statutes, the right to appeal to the courts of another State for the enforcement of his cause of action.

Fourth. The Court erred in holding that if a statute of Alabama creates a transitory cause of action which did not exist at the common law but which was not opposed to the settled policy of Georgia the courts of Georgia will not close their doors to one claiming a right under the Alabama Statute, notwithstanding such statute seeks by its terms to confine the right to sue under it to the courts of competent jurisdiction within the State of Alabama.

Fifth. The Court erred in holding that the decision of the Supreme Court of the United States in the case of Atchison, Topeka & Santa Fe Railway Company versus Sowers reported in the 213th volume of United States Reports, pages 55 to 71, is absolutely
80 controlling on the question presented in the case at bar, and that the trial court properly declined to sustain the defense based upon the provisions of section 6115 of the Code of Alabama of 1907.

ALEX. W. SMITH,
Attorney for Plaintiff in Error.

P. O. Address: 509 Grant Bldg., Atlanta, Ga.

Filed in office June 13, 1912.
LOGAN BLECKLEY, *Clerk C. A., Ga.*

81 Court of Appeals of Georgia.

No. 3846.

TENNESSEE COAL, IRON & RAILROAD COMPANY, Plaintiff in Error,
v.
WILEY GEORGE, Defendant in Error.

Præcipe and Stipulation.

It is agreed by counsel for the parties in the above named case that the following portions of the transcript of the record therein in the Court of Appeals of the State of Georgia are the only parts of the record necessary to be sent up to the Supreme Court of the United States in connection with the writ or error therein, towit:

1. Bill of exceptions and certificate of the trial judge;
2. The declaration in attachment. Transcript pages 1 to 8 inclusive;
3. Answer of the defendant. Transcript pages 9 to 11, inclusive;

4. Order of the trial court striking paragraph five (5) of the defendant's original answer. Transcript page 12.

5. Order of the trial court striking the first count of plaintiff's declaration. Transcript page 13;

82 6. Amended answer, omitting affidavit of counsel thereto. Transcript pages 14 and 15;

7. Order of the trial court striking the plea. Transcript page 15;

8. Exceptions pendente lite. Transcript pages 16 to 18 inclusive;

9. Verdict and judgment in the trial court. Transcript page 19;

10. Extract from the brief of evidence found on page 39 of the transcript showing the tender and admission in evidence of section 3910 of the Code of Alabama of 1907, which is copied in the second count of the declaration in attachment hereinbefore specified;

11. Opinion and judgment of the Court of Appeals of the State of Georgia;

12. Petition for writ of error to the Court of Appeals of Georgia and order of the Chief Justice of said court thereon;

13. The order of the Chief Justice of the Court of Appeals of the State of Georgia allowing writ of error to said Court of Appeals from the Supreme Court of the United States;

83 14. Supersedeas bond;

15. Assignment of errors;

16. The writ of error;

17. Citation and service thereon.

The Clerk of the Court of Appeals of the State of Georgia is hereby requested to make out and transmit to the Supreme Court of the United States portions of the record in the above stated cause hereinbefore specified and agreed upon, as provided by the rules and practice in such cases made and provided.

This the 13th day of June, 1912.

ALEX. W. SMITH,
Attorney for Tennessee Coal, Iron & Railroad Company, Pl'ff in Error.

P. O. Address: 509 Grant Bldg., Atlanta, Ga.

REUBEN R. ARNOLD,
Attorney for Wiley George, Defendant in Error.

P. O. Address: Gould Bldg., Atlanta, Ga.

Filed in office June 13, 1912.
LOGAN BLECKLEY, *Clerk C. A., Ga.*

84 Court of Appeals of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *July* 5, 1912.

I hereby certify that the foregoing pages hereto attached contain the original writ of error and citation together with a true and complete transcript of those parts of the record in the case of Tennessee Coal, Iron & Railroad Company v. Wiley George which are required to be sent to the Supreme Court of the United States under the

præcipe and agreement of counsel, as appears from the records and files of this office.

Witness my signature and the seal of the Court of Appeals of Georgia hereto affixed the day and year above written.

[Seal Court of Appeals of the State of Georgia, 1906.]

LOGAN BLECKLEY, *Clerk.*

Endorsed on cover: File No. 23,288. Georgia Court of Appeals. Term No. 299. Tennessee Coal, Iron & Railroad Company, plaintiff in error, vs. Wiley George. Filed July 12th, 1912. File No. 23,288.

Supreme Court of The United States

OCTOBER TERM, 1913

No. 207

TENNESSEE COAL, IRON AND RAILROAD COMPANY,

Plaintiff in Error,

vs.

WILEY GEORGE

In Error to the Court of Appeals of the State of Georgia.

ALEXANDER W. SMITH, Atlanta, Ga.
Attorney for Defendant in Error.

(24,288)

TENNESSEE, COAL, IRON AND RAILROAD CO.

Versus

WILEY GEORGE.

No. 299,
October Term, 1913.
Supreme Court of the United States

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IN THE

Supreme Court of the United States

TENNESSEE COAL, IRON AND RAILROAD COMPANY

Plaintiff in Error

versus

WILEY GEORGE

Defendant in Error

NO. 299

OCTOBER TERM, 1913

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This is a suit for damages for personal injuries. Plaintiff below secured jurisdiction of the defendant, a corporation non-resident of Georgia, by attachment. The accident occurred in Birmingham, Alabama, at one of the plants of the defendant company. The case was tried before a jury and resulted in judgment for the plaintiff for $11,500.00 and, motion for new trial being overruled, the case went to the Court of Appeals of Georgia through regular channels, and said judgment was affirmed.

The single federal question in this record arose as follows: The declaration in attachment, as originally filed in said case, proceeded on two counts. (Trans. 6, 8.) The first count was based upon alleged negligence of a master toward the servant under the rules of common law (Trans. 7, § 11). The second count was based upon the Employers' Liability Act of the State of Alabama. (Trans. 9, § 11). This Act was set up and relied upon in paragraph fourteen of the second count as being section 3910 of the Code of Alabama (Trans. 10), and is printed in full in the Appendix to this brief, page 32. The Supreme

Court of Alabama declares this Act to be in derogation of the common law and **that the purpose of it "is to protect the employee against the special defenses growing out of and incidental to the relation of employer and employee."** The Act takes away from the employer the defenses of contributory negligence and assumption of risk, and transforms the employee into "a stranger" to his co-employees and to the service and business of his employer.

During the trial of the case, plaintiff below dismissed the first count of his declaration based on the common law, and the case proceeded, under order of the court, upon the second count alone, which was based upon the Employers' Liability Act as aforesaid. (Trans. 13.) When thus amended, defendant below filed an amended plea raising the defense that the right of action based on the Code of Alabama, Sec. 3910, was restricted by Sec. 6115 of said code to courts of competent jurisdiction within that state (Appendix p. 33), and that this limitation upon the invocation of rights of action under said Code sections, said Code itself being a single statute of the State of Alabama, was entitled to full faith and credit in the courts of Georgia, under the Constitution of the United States; that the refusal to so respect and give full faith and credit to such limitation of the right of action under the Alabama Employers' Liability Act was to deny, so far as the rights of the defendant below were concerned, full faith and credit to the public acts of Alabama in the State of Georgia, contrary to the provision of Article 4, Sec. 1 of the Constitution of the United States. (Trans. 14.)

Plaintiff below moved to strike said amended plea, and, after argument of counsel, the same was stricken, as appears of record, on the express ground that the Courts of Georgia will not enforce a statute of Alabama found in section 6115 of the Code of 1907 in a suit brought in Georgia, founded on section 3910 of said Code of Alabama. (Trans. 14.) To the ruling of the court striking the plea of the defendant below, based upon the statutory limitation found in the Employers Liability Act of Alabama, proper exceptions **pendente lite** were lodged, and error thereon duly assigned in the bill of exceptions before the Court of Appeals of Georgia. (Trans. 2.) The judgment of the trial court was in all respects affirmed by the Court of Appeals of Georgia, and writ of error duly issued from this court, under which the case is now here for review. (Trans. 27.)

SPECIFICATION OF ERRORS.

The assignment of errors is found in the record at pages 32, 33 and 34, and specifies the fundamental error in the following variant forms:—

First.

That the Court of Appeals of Georgia erred in not reversing the judgment of the City Court of Atlanta, and sustaining the plea invoking the protection of the Constitution of the United States in Art. IV, Sec. 1, requiring that full faith and credit shall be given in the courts of Georgia to the public acts of the State of Alabama.

Second.

That the Court of Appeals of Georgia erred in denying, by its judgment, full faith and credit to a public act of the State of Alabama in the courts of the State of Georgia, to the injury of plaintiff in error.

Third.

That the Court of Appeals of Georgia erred in holding that neither the Constitution of the United States, nor any act of Congress passed in pursuance thereof, authorizes the legislature of one State to deny to one having a transitory cause of action originating in that State under one of its statutes the right to appeal to the courts of another State for the enforcement of his cause of action.

Fourth.

That the Court of Appeals of Georgia erred in holding that if a statute of Alabama creates a transitory cause of action which did not exist at the common law, but which was not opposed to the settled policy of Georgia, the courts of Georgia will not close their doors to one claiming a right under the Alabama statute, notwithstanding such statute seeks, by its terms,

to confine the right to sue under it to the courts of competent jurisdiction within the State of Alabama.

Fifth.

That the Court of Appeals of Georgia erred in holding that the decision of the Supreme Court of the United States, in the case of Atchison, Topeka & Santa Fe Railway Company versus Sowers, reported in the 213th volume of United States Reports, pages 55 to 71, is absolutely controlling on the question presented in the case at bar, and that the trial court properly declined to sustain the defense based upon the provisions of section 6115 of the Code of Alabama of 1907.

BRIEF.

There is but one question in this case. Is the mandate of the full faith and credit clause of the Constitution of the United States (Art. IV, Sec. 1) obeyed in the courts of a State when it recognizes the public acts of a sister State, creating a right of action nonexistent at the common law, and refuses compliance with the provision of the same statutes restricting the enforcement of that right to the courts of competent jurisdiction in the State creating it?

If not, a federal right is denied and the Supreme Court of the United States has jurisdiction to review the judgment.

A. T. & S. F. Ry. vs. Sowers, 213 U. S. 55;
El Paso &c. Ry. vs. Gutierrez, 215 U. S. 87.

The condition, or limitation, put upon a right of action created by statute, and not existing at common law, inheres in the right itself and follows it into other jurisdictions.

Galveston &c. Ry. Co. vs. Wallace, 223 U. S. 481, 490;
The Harrisburg, 119 U. S. 199;
Davis vs. Mills, 194 U. S. 451, 454;
Munos vs. So. Pac. Co., (5 C. C. A.) 51 Fed. 188;
Stern vs. LaCompagnie Etc., 110 Fed. 996 (2);
The Edna (Ala. Statute), 185 Fed. Rep. 206 (2);
U. S. to use of Gibson vs. Boomer (8 C. C. A.), 183 Fed. 726;
Coyne vs. So. Pac. Co., 155 Fed. 683.

In the Harrisburg case supra this language is found:

"The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

In Davis vs. Mills, supra, Mr. Justice Holmes says:

"The essential feature of that cause of action is that it is one in the jurisdiction which created it; that it is one

elsewhere is a more or less accidental incident. If the laws of Montana can set the limitation to the domestic suit, it is the least possible stretch to say that they may set it also to a foreign action."

In the Wallace case, supra, Mr. Justice Lamar said:

"Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, **or before a special tribunal,** the aggrieved party will be left to the remedy given by the statute which created the right."

Such a condition, or limitation, need not be contained in the same statute. It operates the same way if it be specially attached to such a statutory right of action subsequently and in a different statute.

Davis vs. Mills, 194 U. S. 451, 454.

The Courts of the United States take judicial notice of the public laws of each State of the Union.

Mills vs. Green, 159 U. S. 651, 657.

Where a limitation to local courts is affixed to a cause of action existing at the common law, and independently of the statute affixing it, the limitation was disregarded in the Sowers case, supra (213 U. S. 55). A well defined distinction exists between cases based on common law liability and those depending on statutory rules of liability.

Charleston &c. Ry. Co. vs. Miller, 113 Ga. 15 and cits.
Chicago &c. Ry. Co. vs. Ross, 112 U. S. 377, 382,
Missouri &c. Ry. Co. vs. Mackey, 127 U. S. 205,
B. & O. R. R. vs. Baugh, 149 U. S. 368, 378, 379,
Missouri Pac. Ry. vs. Castle, 224 U. S. 541,
Employers Liability cases, 207 U. S. 463, 537,
Second Employers Liability cases, 223 U. S. 1, 49,
Mobile Ry. Co. vs. Holburn, 84 Ala. 133 (S. C. 4 Sou. 146).

"Interstate venue" or venue as between different countries is

jurisdictional. "Municipal venue," or venue as between different places in the same jurisdiction, as a rule has to do with procedure merely.

Ellenwood vs. Marietta Chair Co., 158 U. S. 105, 108.
British So. Africa Co. vs. Companhia Etc., 2 Q. B. 358.
(S. C. 61 L. J. Q. B. 663; 66 L. T. Rep. N. S. 773; 40 Wkly. Rep. 650.)

There is a profound distinction between the **existence** of jurisdiction in a given court and its proper **exercise** in a given case therein.

Smith vs. McKay, 161 U. S. 355, 358,
Louisville Trust Co. vs. Knott, 191 U. S. 225, 233,
U. S. vs. Larkin, 208 U. S. 333, 338,
Fore River Etc. vs. Hagg, 219 U. S. 175,
Van Fleets Collateral Attack, Chap. IV.

The contention here does not militate against the soundness of the general doctrine, established in the following cases, that whenever a right of action has become fixed and a legal liability incurred, that right of action may be pursued and that liability enforced in any court of competent jurisdiction. This is so because in not one of these cases was the right of action restricted or limited by the law which created it, and that restriction disregarded.

Dennick vs. R. R. Co., 103 U. S. 11, 18;
Texas &c. Ry. Co. vs. Cox, 145 U. S. 593;
Stewart vs. B. & O. R. R., 168 U. S. 445;
Whitman vs. Oxford National Bank, 176 U. S. 559.

The principle involved is closely analogous to that found in the decisions relative to the enforcement of "death statutes" enacted in one State and invoked in another. All restrictions and limitations therein found are enforced everywhere.

Slater vs. Mex. Nat. R. R., 194 U. S. 120, 126;
Chambers vs. B. & O. R. R., 207 U. S. 142.

So, also, it is analogous to the application of statutes of limitations of the **lex loci** in the forum.

Davis vs. Mills, 194 U. S. 451, 457;
Selma &c. vs. Lacey, 49 Ga. 106.

So, also it is analogous to the question of statutory venue of suits under the Act of Congress authorizing actions on contractors' bonds in Government work.

Davidson &c. Co. vs. Gibson, 213 U. S. 10, 16;
U. S. vs. Boomer, (8 C. C. A.) 183 Fed. 726;
U. S. vs. Congress Construction Co., 222 U. S. 199.

In the majority opinion of this court in the case of

Atchison, Topeka & Santa Fe Ry. Co. vs. Sowers, 213 U. S. 55,

Mr. Justice Day construes a statute of New Mexico and says:

"This section does not undertake to create a new and statutory cause of action. . . . If such an action for personal injuries were tried in the territory it would be controlled by common law principles, so far as the right of recovery is concerned. . . . In the present case, in determining the merits of the cause of action, common law principles were applied in the Texas court as they would have been in the court of New Mexico. . . . This record discloses that the affidavit required by the statute of New Mexico was made and served within the time prescribed, and that the action was commenced within one year. The only feature of the New Mexico statute which was disregarded was the requirement that suit should be brought only in the District Court of the Territory. But we are of opinion that where an action is brought in another jurisdiction **based upon common law principles**, although having certain statutory restrictions, such as are found in this act, as to the making of an affidavit and limit-

ing the time of prosecuting the suit, full faith and credit is given to the law, when the recovery is permitted, subject to the restrictions upon the right of action imposed in the Territory enacting the statute."

The principle clearly decided here is that statutory restrictions are binding in the foreign jurisdiction because of the "full faith and credit" clause of the Constitution, the requirement as to venue not being binding because the substantive cause of action was cognizable at common law and, therefore, was independent of the statute.

Mr. Justice Holmes (with whom Mr. Justice McKenna concurred) dissented because the requirement as to venue was not also complied with, saying: "The Territory could have abolished the right of action altogether if it had seen fit. It stated by its statutes that it would not do that, but would adopt the common law liability on certain conditions precedent, making them, however, absolute conditions to the right to recover at all. One of these conditions was that the party should sue in the Territory. Section 1. A condition that goes to the right conditions it everywhere. Davis vs. Mills, 194 U. S. 451, 457. I am willing to assume that the statute could not prohibitit a suit in another State, and, indeed, it recognized that in that particular it might be disobeyed with effect. Section 3. But I do not see why the condition in § 1 was not valid and important. If it had been complied with there might have been a different result."

Inasmuch as the Statutes of Alabama, here under consideration, confessedly create a new and statutory cause of action, expressly abrogating common law principles otherwise applicable, the doctrine of the Sowers case, supra, does not support the judgment under review.

ARGUMENT.

The single Federal question now pressed in this record is based upon the contention that the refusal of the court to respect the statute of Alabama, restricting cases, brought under its Employers Liability Act, to courts of competent jurisdiction in its own borders, is obnoxious to Art. IV, Sec. 1 of the Constitution of the United States, the first sentence of which is in the following language:

> **"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."**

The learned justice who delivered the opinion of the Court of Appeals of Georgia, treats the provision of the laws of Alabama, restricting suits under its Employers Lialbility Act to courts of competent jurisdiction in its own territory, as part and parcel of the Employers Liability Act itself. (Trans. 20.)

Should this court deem it important, it will find that said restricting provision and said Employers Liability Act are parts of one statute, under the Constitutional requirements of that state as to its Code.

> **See Constitution of Alabama, Sec. 85;**
> **Code of 1907, Vol. 1, flyleaf (Proclamation);**
> **Code of 1907, Vol 1, page 1 (Adopting Act);**
> **Reprint of all which is in the Appendix to this Brief.**

But the result is the same if sections 3910 and 6115 be considered separate acts, according to the following quotation from

Davis vs. Mills, 194 U. S. 451, 454:

> "But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the

obligation everywhere. The same conclusion would be reached if the limitation was a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."

The argument will be focused on a critical analysis of the case of

Atchison, Topeka & Santa Fe Ry. vs. Sowers, 213 U. S. 55,

upon the ruling in which the Court of Appeals of Georgia bases the opinion and judgment here excepted to.

The obvious distinction of the Sowers case from the case at bar is that the substantive cause of action in the former existed at common law and did not, as in the latter, depend upon the statute.

The rule of the majority in the Sowers case, requiring compliance with the preliminaries of notice and demand specified in the law of New Mexico, when sued on in Texas, was unanimously reaffirmed in

El Paso Ry. vs. Gutierrez, 215 U. S. 87, 92.

This doctrine requires such compliance notwithstanding the cause of action existed and was tried under the rules of the common law of force in the forum. The condition limiting suits to the courts of New Mexico was disregarded in the Sowers case **only** because the statute of New Mexico did "not undertake to create a new and statutory cause of action," and, therefore, if that case had been "tried in the Territory (of New Mexico) it would be controlled by common law principles, so far as the right of recovery is concerned." (213 U. S. 69.) It follows that the case supports our contention here, because here the statute did "undertake to create a new and statutory cause of action" and, therefore, a case under it, whether tried in Georgia or Alabama, would be controlled by the principles of liability prescribed by the statute, and not by any rule of liability existing in Georgia.

Judge Pottle, of the Court of Appeals of Georgia, declined to recognize this distinction, as he argues in the opinion,

> First: Because the limitation sought to be imposed by the legislature of Alabama goes merely to the remedy. (Trans. 24.)
>
> Second: Because there is no such thing as a common law liability except as such liability may be recognized by statute; that while the right may be founded upon the common law, and the origin of the right may be derived from the common law, it is none the less statutory, and therefore no distinction between common law rights and statutory rights exists. (Trans. 25.)

Contending that no distinction can be maintained between the Sowers case (213 U. S. 55) and the case at bar the opinion on this question concludes:

> "Our opinion is that the decision of the Supreme Court of the United States above referred to is absolutely controlling on the question presented and that the trial court properly declined to sustain the defense based upon the provisions of § 6115 of the Code of Alabama of 1907." (Trans. 25.)

Limitations of Remedy As Binding As Limitations of Right.

The position of Judge Pottle that the limitation sought to be imposed by the Alabama statute can be constitutionally ignored in Georgia because it goes merely to the remedy is not sustained by pertinent authority. The Sowers case (213 U. S. 55) itself, required the plaintiff in the Texas court to comply with the conditions of the New Mexico statute as to service of a preliminary affidavit, which was but a step in enforcing the remedy. Indeed, where a new and statutory cause of action is created, there is no longer any distinction between conditions which go to the remedy merely and those which affect the cause of action itself.

Statutes of Limitation.

The principle which controls this question cannot be distinguished from the principle under which the statute of limitation of the forum is made to yield to the statute of limitation of the place where the cause of action originated, wherever such limitation is a condition attached to the right of action itself. That principle is firmly established in Georgia by

Selma vs. Lacy, 49 Ga. 106.

Commenting on this case in Akin vs. Freeman in the same volume, the court says on page 65:

> "There the Code of Alabama has provided that the representative of one who had been tortiously killed might, within twelve months, maintain an action for damages against the wrong-doer. A suit was brought in this State on the statute. By the general rule of law the statute of limitations of the place of trial regulates the right of the parties to sue. Our statute of limitations for torts is two years. But this court unanimously held that the suit must be brought within twelve months, because it was upon that condition that the right of action was given by the law of Alabama."

The Supreme Court of the U. S. decides the same way in **Davis vs. Mills, 194 U. S. 451, 457.**

Mr. Justice Holmes, delivering the opinion, says:

> "In the case at bar the question comes up in the most attenuated form. The law is dealing not with tangible property, but with a cause of action of its own creation. The essential feature of that cause of action is that it is one in the jurisdiction which created it; that it is one elsewhere is more or less accidental incident. If the laws of Montana can set the limitation to the domestic suit, it is the least possible stretch to say that they may set it also to a foreign action, even if to that extent an existing right

is cut down. We can see no constitutional obstacle in the way, and we are of opinion that they have purported to do it and have done it."

It is established beyond controversy by the cases cited in the brief, and many others which might be cited, that the general rule which applies the statute of limitation of the forum yields to the special statute of limitations of the **lex loci** when such limitations are a part of the same legislation which creates the right of action, or the rule of liability.

Restrictions to Federal Courts.

The principle here contended for is supported by the decisions of the United States courts construing the Act of Congress (Aug. 13, 1894, 28 Stat. 278, and Feb. 24, 1905, 33 Stat. 811) requiring contractors for Government work to give bonds, and giving persons furnishing labor and materials a right of action on such bonds to recover therefor. These acts limit the new right of action thus created both as to time and place. The time limitation and the restriction of courts in which suit may be instituted must be, alike, respected. As originally enacted the action could be brought either in State or Federal Courts. (U. S. vs. Henderling, 102 Fed. 2.) Before amendment the action had to be brought in the district of defendant's residence. (U. S. vs. O'Brien, 120 Fed. 446.) And the United States was the real party in interest (U. S. F. & G. Co. vs. U. S., 204 U. S. 347.)

The amendment of 1905 among other things fixed definitely that the action should be brought in the Circuit Court of the United States **in the district where the contract was to be performed and not elsewhere.** This amendment is not retroactive. (Davidson vs. Gibson, 213 U. S. 10, 16.)

This act as amended was construed by the Eighth Circuit Court of Appeals in U. S. vs. Boomer, 183 Fed. 726. The statute of limitations was involved, and it was held that the institution of a prior suit in the State Court of Colorado did not intercept

the statute of limitations because the amendment restricted all such suits to the Federal Circuit Court.

The latest decision involving this Act of Congress was rendered December 4, 1911, in the case of

United States vs. Congress Construction Co., 222 U. S. 199.

Here the restriction as to place of suit to enforce a cause of action created by the statute is upheld to the last literal line of it. It is held to supersede the general law of Congress fixing the venue of suits in the Federal Courts, and to authorize service of process in such cases in any district where the defendant may be found. A restriction as to place of suit is thus so interwoven with the cause of action sued on that a suit brought in disregard of the restriction has not enough vitality to intercept the statut of limitations, in one case, and in another this restriction is of sufficient vitality to override the general law of venue in the courts of the United States. In the case at bar a similar restriction is expressly disregarded, although the cause of action depends upon the statute upon which the restriction is intended to operate.

Venue.

The authorities draw a distinction between "Interstate Venue" and "Municipal Venue;" the former is jurisdictional, while the latter has to do with procedure merely.

This court in

Ellenwood vs. Marietta Chair Co., 158 U. S. 105.

holds that a Federal Court sitting in one State will strike from its docket a case of trespass upon land in another State although no question of jurisdiction is raised by demurrer or plea. Such ruling does not mean that such a court had no jurisdiction of the subject matter of suits for trespass upon land, but only that such jurisdiction would not be exercised where the land in question was not within the territorial jurisdiction of the Court. In that

case the Court cites, with approval, the case of

British So. Africa Co. vs. Companhia de Mocambique App. Cas. 602, 621; (S. C. 2 Q. B. 358; 40 Wkly. Rep. 650).

In this English case Lord Esher points out that the English rules of Municipal Venue are rules of procedure, but that the distinction as to "Foreign Venue" (as between different countries) is "a distinction as to jurisdiction and not as to procedure." This distinction must be read into the meaning of "venue" as between States, with the result that a restriction of venue, as between States, is a restriction upon jurisdiction, and not a mere rule of procedure.

From these authorities and analogies, we submit, the argument is unsound that because the limitation goes merely to the remedy it may be disregarded.

Distinction Between Common Law and Statutory Liability.

The learned Judge's second contention that there is no distinction between common law and statutory liability will now be considered.

Whether or not there is any common law in this country that is not also statutory is an academic question. In practice the distinction between common law and statutory liability is so well defined in Georgia that the Supreme Court of the State holds that

> "Where an action is brought solely upon a common law liability, it is error to allow an amendment thereto which seeks a recovery upon a statutory liability. Such an amendment would add a new and distinct cause of action."

Charleston Ry. Co. vs. Miller, 113 Ga. 15, and cases cited.

Mr. Justice Lamar was counsel in this case and, by establishing the proposition above quoted, gained his case. This decision of the Supreme Court of Georgia has never been modified or overruled.

In the sense in which Judge Pottle treats it, there is said to be

no common law of force in the courts of the United States, as a nation, and yet its Supreme Court has repeatedly recognized and defined the common law rule which exempts the master from liability to a servant for the consequences of the negligence of a fellow servant. Perhaps the most instructive case giving the history of the rule, and its origin and philosophy, is that of

Chicago R. R. vs. Ross, 112 U. S. 377, 382.

The rule of the common law which declined to hold the master liable to his servant for the negligence of a fellow servant originated in no statute, and yet it has existed so universally as to prompt so eminent a lawyer as the late John F. Dillon to invoke the opinion of this great court as to whether a statute abrogating it, as to railroad employers, was not obnoxious to the 14th Amendment of the Federal Constitution. See

Mo. Ry. Co. vs. Mackey, 127 U. S. 205.

In holding that a locomotive engineer and his fireman were fellow servants, this court said in the case of

B. & O. R. R. vs. Baugh, 149 U. S. 368, 378, 379,

> "But passing beyond the matter of authorities, the question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage; or custom; there is in it no rule of property, but it rests upon those conditions of right and justice which have been gathered into the great body of the rules and principles known as the common law."

As late as May, 1912, in the case of M. P. Ry. Co. vs. Castle, 224 U. S. 541, Mr. Chief Justice White held for this court that liability of employer to employee, for injuries caused by the negligence of co-employees in the same service, is necessarily a statutory right of action, and a departure from the common law rule on the subject.

Mr. Justice Moody lucidly shows the distinction between statutory and common law rights of action, in negligence cases, in

his dissenting opinion in the first Employers' Liability cases, 207 U. S. 537. Second Employers' Liability cases, 223 U. S. 1, 49, likewise draw the distinction clearly and authoritatively.

Judge Pottle, we submit, is therefore inaccurate in saying "that the right created by the Alabama statute, now under consideration, did exist at common law, although there are certain statutory incidents and qualifications which were not recognized at common law" (Trans. 25).

The fundamental purpose of the Employers' Liability Act of Alabama, as expressed in its opening paragraph, is to make the employer, under certain circumstances, liable to answer in damages to his servant as if he, the servant, were a stranger, and not engaged in such service. The plaintiff below brought himself, by his allegations, within the circumstances which entitled him to the rights of a stranger to recover damages for the injuries received. This statute, therefore, created a cause of action which did not exist without it. Instead of being a right of action at the common law, it created a right of action under conditions which at common law precluded recovery. It not only creates the new right of action under circumstances in which it did not formerly exist, but controls the proceeds of recovery by exempting them from liability to pay the debts of the plaintiff. (Code of Alabama 1907, Sec. 3911 printed in the Appendix page 33.)

Mobile Ry Co. vs. Holburn, 84 Ala. 133 (S. C. 4, Sou. 146).

The Supreme Court of Alabama here authoritatively construes the Employers' Liability Act of that state. Among other things it is held to be in derogation of the common law, and "the primary and general purpose of the statute is to abolish, in the specified cases, the rule which exempted employers from liability to answer in damages for an injury suffered by the negligence of a co-employee. . . . **The purpose of the statute is to protect the employee against the special defenses growing out of and incidental to the relation of employer and employee.**"

Is it true then that the right asserted under the Alabama Act is the same cause of action as the injured employee would have had

before its passage? Obviously not. Then, all the conditions imposed by that act must be as binding as the enlarged rights are available.

The effect of Art. IV, Sec. 1 of the Constitution, as fixed by the acts of Congress passed pursuant thereto (Sections 905-6, Rev. Stat.), is limited to the **records and judicial proceedings** authenticated as prescribed in the Acts. These Acts prescribe the rules of evidence by which the Acts, records and judicial proceedings in one State may be proven in another. But the Courts of the United States take judicial notice of the **public laws** of each State of the Union.

Mills vs. Green, 159 U. S. 651 (and citations on page 657).

As the case at bar complains of failure to give full faith and credit to a **public act** of the State of Alabama, which act was set out in full in the pleading demurred to, and thereby admitted, no question of its proof or authenticity exists.

The Georgia Court quoted the opinion of Mr. Justice Day in the Sowers case (213 U. S. 55) as to the effect of Section 906, Revised Statutes, on the duty of the courts of one State in enforcing statutory rights created by a sister State, but we insist wholly misconceived that opinion in holding that the provisions of that statute enlarged the rights of the plaintiff. The effect of the ruling was to restrict the plaintiff to all the conditions imposed by the statute of the Territory as fully as if it had been the statute of a State. The restriction confining suits to the local courts of the Territory of New Mexico was held not binding **solely** because the cause of action itself existed at the common law.

It is submitted, therefore, that inasmuch as the Alabama statute created a cause of action which did not exist at common law, the doctrine of the Sowers case (213 U. S. 55) supports our contention here.

There was a dissent in the Sowers case, two of the Justices being of opinion that the New Mexico restriction to its own courts was binding notwithstanding the principles of the common law applicable to such injuries were not modified by the statute. The argument of Mr. Justice Holmes in dissent (with whom Mr. Jus-

tice McKenna concurs) is very strong. The tense concentration of expression which this profound judge employs makes some elaboration necessary to the ordinary mind of counsel writing this brief, and may be excused by others.

The distinction he draws is two-fold. First, as to the right of action itself. If the right of action exists independently of the statute, a legislative restriction of it would not be obligatory outside the territorial jurisdiction of the Legislature, because such result would give extra-territorial force to such legislation. The foreign court can enforce the right independently of the Acts of the State whose legislation is invoked, because the right exists independently thereof. But if the right of action depends for its existence on a statute, the Legislature rises to the plane of a creator, and may **condition** the very existence of its creature, much less the use and enjoyment of it by others. A foreign court can exercise its pleasure as to whether or not it will use this legislative creature. If not, no constitutional provision is violated. But if the court decides to employ it, it must be accorded full faith and credit; all of its form, features, and functions, must be recognized. If its creator attached to it a ligament, binding it to other members of the creator's body-politic, the foreign court could not legally sever this vital connection, any more than it could legally invade the realm and environment in which it was meant to live and destroy the thing itself.

The thought thus elaborated was compressed by Mr. Justice Holmes into these pregnant words: "A condition that goes to the right conditions it everywhere." (213 U. S. 71).

The next distinction the learned Justice draws relates to the place where said newly created right of action, or rule of liability, could be invoked and enjoyed.

Restricting, as we must, the direct and mandatory operation of all legislation to the territorial jurisdiction of the Legislature, it would be utterly futile for one State to enact that a cause of action, transitory in nature, and existent independently of the laws of said State, should not be brought in the courts of any other

sovereignty. Its prohibition would be **brutum fulmen** and wholly irrelevant. Such a State might itself be blotted out, and all of its laws with it, and not in the least affect the case. But how different would it be if the cause of action, itself, was rooted in the legislation of a given State and its benefit invoked in another State? The foreign court would still have jurisdiction to enforce the right, but whether or not it could rightfully exercise that jurisdiction in disregard of a condition going to the right itself, restricting its enforcement to courts of competent jurisdiction in the State creating it, raises a question which cannot be put aside with a word. Mr. Justice Holmes compresses this thought into this small compass: "I am willing to assume that the statute could not prohibit a suit in another State . . . . but I do not see why the condition (restricting suits to the courts of New Mexico) was not valid and important. If it had been complied with there might have been a different result." (213 U. S. 71.)

The Sowers case, thus analyzed, is clearly distinguished.

Since the Sowers case (213 U. S. 55) the question has been considered by this court in

Galveston &c., Ry. Co. vs. Wallace, 223 U. S. 481, 490.

Mr. Justice Lamar, delivering the unanimous opinion of the court, follows the established rule that "State courts have jurisdiction of any civil and transitory action created by a foreign statute, provided it is not of a character opposed to the public policy of the State in which the suit is brought," but clearly preserves the dictinction (insisted on in the case at bar) that "where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, **or before a special tribunal,** the aggrieved party will be left to the remedy given by the statute which created the right."

WRONGFUL DEATH STATUTES.

Slater vs. Mexican National R. R., 194 U. S. 120, 126.

In dealing with the subject of wrongful death statutes of Mexico in Texas, in the above stated case this Court said:

"As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. Stewart vs. Baltimore & Ohio R. R., 168 U. S. 445. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the lex fori, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which, like other obligations, follows the person, and may be enforced wherever the person may be found. Stout vs. Wood, 1 Blackf. (Ind. 71); Dennick vs. Railroad Co., 103 U. S. 11, 18. But as the only source of this obligation is the law of the place of the act, it follows that the law determines not merely the existence of the obligation, Smith vs. Condry, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

Chambers vs. B. & O. R. R., 207 U. S., 142.

The court divided in the application of established principles to the facts in the case last cited as follows:

Plaintiff as the widow of her deceased husband, a citizen of Pennsylvania, brought suit in the Ohio State Court for his wrongful death in a railroad accident occurring in Pennsylvania, basing her cause of action on the statute of Pennsylvania. Her case was thrown out of court because the statute of Ohio, as construed by its Supreme Court, limited actions in its courts based on wrongful death statutes of other States to the homicide of citizens of Ohio.

The majority opinion affirmed this disposition of the case because the Pennsylvania statute, as construed by its Supreme Court, created an original cause of action in the widow and not a survivorship of the cause of action her husband would have had for injuries short of death; that, therefore, plaintiff was seeking to enforce her own cause of action, vested originally in her; that she was denied access to the Ohio courts to enforce this cause of action because the cause of action itself was not cognizable therein, and not because of her citizenship in Pennsylvania.

Mr. Justice Holmes rests his concurrence (page 151) on the proposition that if the statute cannot operate as it purports to operate it does not operate at all, and that "apart from the statute no one can maintain an action like this in Ohio."

The dissenting opinion is based on the premise that plaintiff was denied the privilege others might have enjoyed. This would be true provided anybody, even a citizen of Ohio, had the privilege of suing in the Ohio courts on a cause of action growing out of the death of this particular man at the particular time and place of his homicide.

Applying to the case at bar the fundamental principles, in which all the Justices concurred in the Chambers case: If the Employers' Liability Law of Alabama is limited in its operation to the courts of Alabama, it cannot operate in the courts of Georgia as it purports to operate by its own limitations; and if it cannot operate as it purports to operate, it does not operate at all; and yet, apart from it, the plaintiff below cannot maintain the cause of action recovered on in Georgia. Therefore the judgment rendered therein is necessarily contrary to law.

CASE IN POINT.

A case very much in point is found in

Coyne vs. So. Pac. Co., 155 Fed. 683.

Judge Marshall had before him, in this case, a statute of Nevada invoked and relied on in the courts of Utah. The statute, as to the substantive right of action, was held to be only declaratory of the Common Law, but enforcement of the right was limited to the courts of Nevada. The statute as a whole was held to supersede the Common Law, the court saying:

> "Thereafter the plaintiff's right was no less an exclusively statutory right because the same facts would have created a right under prior common law principles. Commonwealth vs. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377; Commonwealth vs. Cooley, 10 Pick. (Mass.) 37; Gorham vs. Luckett, 6 B. Mon (Ky.) 146; Gwinner vs. Leigh, etc., etc., R. R. Co., 55 Pa. 126. Viewed as a statutory right, it must be admitted that the State creating the right can attach to it any valid condition, so that, when the right is sought to be vindicated in another State or in a foreign country, the condition must also be applied. Hamilton vs. R. R. Co., 39 Kan. 56, 18 Pac. 57; Slater vs. Mexican Nat. R. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900; Minor's Conflict of Laws, Sec. 202."

After quoting from the Slater case (194 U. S. supra), Judge Marshall proceeds:

> "In Nonce vs. Richmond & D. R. Co. (C. C.), 33 Fed., at page 435, it is said: 'A cause of action arising under a statute **may be made local by the express terms of the statute**; and, if the provisions of such law are not complied with, the right thus conferred may be extinguished, and cannot be enforced in the court of another State.
>
> "At common law such an action as this was transitory, and a suit for trespass to real property local; but this common law distinction is not removed from legislative control, and, **when the place of trial is attached to the right as a condition, I know of no authority to recognize the right and ignore the condition,** unless it is violative of some superior law. As the statute in question does not discriminate against federal

courts, there is no basis for questioning its validity."

Judge Marshall goes to an extent not necessary in the case at bar, holding that, although the Montana statute was only declaratory of the substantive right of action already existing at the common law, it was no less an exclusively statutory right. Being such, any valid condition to its enjoyment must be applied. To this extent his decision is overborne by Sowers case (213 U. S. 55). Judge Marshall intimates that the only condition as to place of trial which would be invalid and opposed to some superior law would be one excluding Federal Courts of competent jurisdiction. But the restriction in the Alabama statute is not open to this objection because the courts of the United States within the State of Alabama are as competent as the State courts of Alabama when citizenship, residence, and amount involved exist as required.

PRINCIPLES ANALYZED.

We believe the result in the present case would have been different if the courts below had clearly borne in mind the distinction between the **existence** of jurisdiction in certain courts and the propriety of **exercising** it in particular cases. Jurisdiction as applied to courts means "power," and any power possessed by a court is jurisdiction. (See Van Fleet's Collateral Attack, Chapter IV.) As Mr. Justice Brown said: "Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence." **(Illinois Central Ry. Co. vs. Adams, 180 U. S. 28.)** Allegations disclosing a state of things which, if true, would give jurisdiction to a given court over a given case stimulate the power of that court into action. This action is the exercise of the power of the court. Whether that exercise of power terminates in favor of the one side, or the other, depends upon the truth or falsity of the allegations, which, for jurisdictional purposes, must be assumed to be true until the contrary appears. So, also, the facts alleged must be taken to be all the facts involved, until additional facts are averred by the defendant as a substantive defense. When new facts are averred by the defense the application of the

power of the court thereto, whether to recognize said averment as a valid defense, if proven, or to reject the same as insufficient though admitted, is, in like manner, the **exercise** of the jurisdiction of the court over the suit and the defense thereto. It is as to **existence** of jurisdiction or power, and in what courts it shall vest, and the character of controversies to be heard in them, that "each State may, subject to the limitations of the Federal Constitution, determine for itself." This includes the determination of how far these courts will entertain transitory actions on causes arising outside the borders of said States. In determining these questions local courts are uncontrolled by the legislation of any other State. As to such questions we agree with Judge Powell that "our sense of justice, subject to the guidance of the lawmaking power of this State, determines solely and alone what laws, domestic or foreign, we will enforce." (So. Ry. Co. vs. Decker, 5 Ga. App. 34, Trans. 21.) But these questions should not be confounded with the subsidiary matters which may arise in the progress of enforcement of foreign causes of action, after jurisdiction of a given cause has attached.

See the clear distinction between the **existence** of jurisdiction and its rightful **exercise** pointed out by the learned Justices in the case of

Smith vs. McKay, 161 U. S. 355, 358.

The distinction here drawn between the existence and the exercise of jurisdiction was subsequently recognized in the following cases:

Louisville Trust Co. vs. Knott, 191 U. S. 225, 233;
U. S. vs. Larkin, 208 U. S. 333, 338;
Fore River, etc., vs. Hagg, 219 U. S. 175, 179.

CONCLUSION.

Coming from the abstract to the concrete. In the case at bar the City Court of Atlanta was wholly untrammeled in determin-

ing whether or not it would assume to enforce in Georgia the rules of liability under the Alabama Employers' Liability Law. Had section 6115 been embodied in 3910, and set up as a part of it so that demurrer would have been available to the defendant, the jurisdiction of the City Court would have attached as a condition precedent to exercising the power to decide the question raised by demurrer. If such a demurrer had been sustained on the ground now insisted upon, viz.: that the cause of action plead was restricted by its own terms to the courts of competent jurisdiction within the State of Alabama, such action by the City Court of Atlanta would not have been the result of any extra-territorial effect of the statutes of Alabama affecting the jurisdiction, or power, of the courts of Georgia to determine what causes of action they would assume to hear; such action would have been merely the result of extending full faith and credit to the public Acts of Alabama by the courts of Georgia (in the exercise of their inherent jurisdiction) in determining whether or not plaintiff was entitled to enjoy the benefit of the cause of action created by said public Acts. In doing this the City Court of Atlanta would be **exercising** its jurisdiction, which **existed** independently of the Alabama statutes, and the judgment sustaining the demurrer and remitting the plaintiff to the courts in which alone said cause of action could be legally enjoyed, would be the final act in the **exercise** of such power.

Assimilating all these cases, and the principles upon which they rest, the digested result is that the City Court of Atlanta was no less bound to respect and enforce the statutory restriction to courts sitting in Alabama of all cases brought under Alabama Code, section 3910, **when such restriction was invoked by the defendant,** than it was to respect and enforce the statutory liability of the master to the servant **when such liability was sought to be enforced by the plaintiff.** Indeed its obligation to observe the restriction sprang from the same source as the liability plaintiff sought to enforce, and barred its legal right to proceed further. If this be not so, where will the line be drawn? Suppose the Ala-

bama Legislature had embodied an express restriction upon the right to bring any suit anywhere under said statute after the expiration of six months from the date of injury. No one can deny that the City Court of Atlanta must have respected such a restriction. Suppose section 6115 limited suits under 3910 to employees engaged in mining, could a railroad employee have invoked it in Georgia? Or, vice versa? We apprehend not. Suppose section 6115 limited such actions to homicide cases and confined recoveries to widows, could the courts of Georgia be asked to enforce section 3910 for injuries short of death, or for death in favor of brothers and sisters in the absence of a widow? Of course not. **Suppose the original Act of Alabama, upon which the case at bar is planted, had been repealed the day before the accident complained of,** will any lawyer have the temerity to contend that the court below would, nevertheless, have stricken a plea setting up the repealing Act as a defense to the case? **Yet the greater must include the less.** The Legislature of Alabama need not have passed any Act creating an entirely new set of rules governing the relation of master and servant. When it undertook to legislate on the subject it had full power to gauge the stringency of such rules, and to limit the time within which, **and restrict the place where,** these new rights and liabilities could be invoked and enforced. Having done so, the Constitution of the **United States commands** that full faith and credit shall be given to said public Acts and to every part of them, in each State of the Union. Unless full faith and credit is consistent and synonymous with express disregard and positive disobedience, the mandate of the Constitution of the United States, expressed in Art. IV, Sec. 1 thereof, was ignored in the present case.

On the other hand, as we have already shown, obedience to this mandate of the supreme law of the land does not unduly restrict the power of the trial court to determine, either the limits of its jurisdiction, or the character of the controversies which shall be heard in it. It has full choice as to what transitory actions arising in other jurisdictions it will entertain, but when it does entertain such a cause it must take it **cum onere.** Any other course

would be tantamount to **extra-territorial legislation by the local court.** For instance, **the action of the lower court striking defendant's plea had the legal effect of repealing Sec. 6115 of the Code of Alabama,** so far as the defendant was concerned. The result of that repeal may have been most disastrous to the defendant. It was compelled to bring its witnesses away from the scene of the accident, into another State, and go to trial before a foreign jury. Any unforeseen developments at the trial could neither be anticipated nor rebutted, because of the absence of the records, employees, and managers of defendant at its plant in another State. The stringency of the law of Alabama as to liability was enforced to the limit, at the same time denying to defendant the safeguard of local trial where the "ways, works, machinery or plant . . . used in the business of the master" were situated, and the persons in its service lived. (Trans. p. 10, par. 14, s. s. 1, 2.)

Under such conditions it is not surprising the defendant below was confronted with the large judgment of which, as plaintiff in error, it now complains.

Believing that verdict to be contrary to law, and therefore unjust, we earnestly invoke a reversal.

Respectfully submitted.

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APPENDIX.

CONSTITUTION OF ALABAMA 1901, SEC. 85.

Section 85. It shall be the duty of the Legislature, at its first session after the ratification of this Constitution, and within every subsequent period of twelve years, to make provision by law for revising, digesting, and promulgating the public statutes of this State, of a general nature, both civil and criminal.

ACT ADOPTING THE CODE OF ALABAMA.

AN ACT

To adopt a code of laws for the State of Alabama.

Section 1. Be it enacted by the Legislature of Alabama, That the work prepared by James J. Mayfield under "An Act to provide for the revision, codification, digesting, and promulgating of the public statutes of this State, both civil and criminal," approved September 30th, 1903, is as the same has been revised, amended, corrected, and reported by the joint committee of the two houses of the Legislature, which is shown upon the sheets of manuscript signed by the chairman of the joint committee, adopted and enacted as the Code of Alabama, and shall regulate completely, so far as a statute can, the subject to which it relates, and shall go into force and be operative on the thirtieth day after the date of the Governor's proclamation announcing its publication.

Sec. 2. No Act passed on or after the ninth day of July, 1907, shall be repealed or affected in any manner by the adoption of this Code. All acts amending sections of the Code of 1896, which sections have been incorporated in this Code, shall be printed in the place of and as such sections.

Sec. 3. All acts of the present session of the Legislature passed on or after July 9th, 1907, which are of a general nature, shall be incorporated in the Code at the appropriate place with reference to its subject-matter, and become and be published as a part of the Code, so that every statute of a general nature of this State, in force at the time of publication of the Code, shall be incorporated therein.

Sec. 4. The section of the manuscript corresponding to section 1370 of the Code of 1896, be, and is hereby, stricken out, and not carried into the new Code.

Approved July 27, 1907.

PROCLAMATION FIXING DATE CODE OF ALABAMA OF 1907 TOOK EFFECT.

Whereas, by the tenth section of an Act "To provide for the publication and distribution of the Code of Alabama," it is made the duty of the Governor, upon the delivery of ten thousand copies of said Code to the Secretary of State, to issue his proclamation announcing that fact and designating a day on which said Code shall go into effect.

And, whereas, the Hon. Frank N. Julian, Secretary of State, has certified to me that the requisite number of copies of said Code has been delivered;

Now, therefore, I, B. B. Comer, Governor of the State of Alabama, in compliance with the statutes adopting and providing for the publication and distribution of the Code of Alabama, do hereby declare that the requisite number of copies of said Code has been delivered to the Secretary of State, and I do hereby fix, designate and appoint the 1st day of May, 1908, as the day upon which said Code shall go into effect, thereupon said Code, having been duly adopted by the General Assembly of Alabama, shall become operative, and full faith and credit shall be given the same.

In testimony whereof I have hereunto set my hand and caused the Great Seal of State to be affixed, at the Capitol, in the City of Montgomery, on this, the 1st day of April, A. D. 1908.

Alabama
Great Seal

B. B. COMER, Governor.

By the Governor:

FRANK N. JULIAN,
Secretary of State.

EMPLOYERS' LIABILITY ACT OF ALABAMA SUED ON IN THIS CASE.

3910. Liability of master or employer to servant or employee for injuries. When a personal injury is received by a servant or employee in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employee, as if he were a stranger, and not engaged in such service or employment, in the cases following:

(1) When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in the business of, the master or employer.

(2) When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence.

(3) When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employee, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed.

(4) When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf.

(5) When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive, engine, electric motor, switch, car, or train upon a railway, or of any part of the track of a railway.

The master or employer is not liable under this section, if the servant or employee knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or em-

ployer, unless the master or employer, or such superior, already knew of such defect or negligence; nor is the master or employer liable under subdivision 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition; provided, that in no event shall it be contributory negligence or an assumption of the risk on the part of a servant to remain in the employment of the master or employer after knowledge of the defect or negligence causing the injury, unless he be a servant whose duty it is to remedy the defect or who committed the negligent act causing the injury complained of." (Trans. 10, § 14.)

DAMAGES RECOVERED UNDER SAID ACT EXEMPT FROM PLAINTIFF'S DEBTS.

3911. Damages exempt. Damages recovered by the servant or employee, of and from the master or employer, are not subject to the payment of debts, or any legal liabilities incurrred by him.

VENUE OF ACTIONS UNDER EMPLOYERS' LIABILITY ACT OF ALABAMA.

6115. Venue of actions under sections 2486 and 3910. All actions brought under sections 2486 and 3910 must be brought in a court of competent jurisdiction within the State of Alabama and not elsewhere.

The foregoing Appendix is attached to the Brief and Argument for Plaintiff in Error in the case of Tennessee Coal, Iron and Railroad Company vs. Wiley George, in the Supreme Court of the United States.

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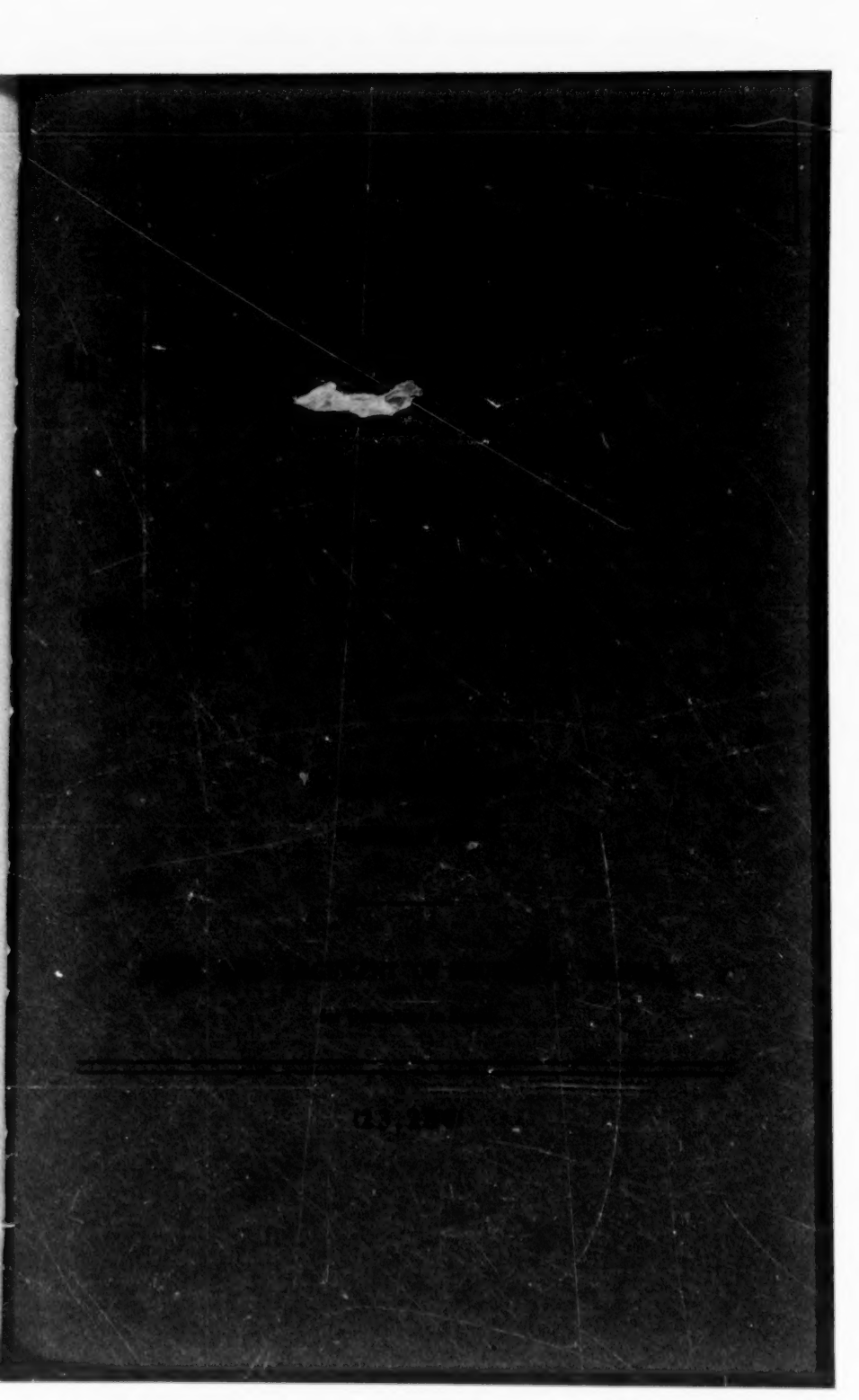

IN THE

Supreme Court of the United States

TENNESSEE COAL, IRON & RAILROAD COMPANY,
Plaintiff in Error,

vs.

WILEY GEORGE,
Defendant in Error.

No. 299.
October Term, 1913.

STATEMENT OF FACTS, BY DEFENDANT IN ERROR.

Wiley George sued the Tennessee Coal, etc., Company, in the City Court of Atlanta, to recover damages for personal injuries received in the State of Alabama, where George was employed by the company as engineer.

Jurisdiction of the defendant company was acquired by attachment. The defendant came into court, and pleaded to the merits of the case.

George, in his declaration, set forth that the engine he was employed to operate, was defective; that the brake would not work satisfactorily; that whil he was at work undertaking to adjust the nut on the brake under the cab, having "chocked" his engine, that the engine started backwards, on account of its defective condition, and injured him. It was set forth that the throttle of the engine leaked, and other defective conditions were alleged, which were claimed by the plaintiff to be defects in the condition of the ways, works, machinery and plant used

in the business of the defendant, and it was alleged that the defendant failed to properly inspect the engine, and was negligent in not discovering these defects. Plaintiff invoked as applicable to the case Section 3910 of the Alabama Code of 1907, which, among other things, made the employer liable for defects in the condition of the ways, works, machinery and plant used in the master's business, if the defect arose from, or had not been discovered or remedied, owing to the negligence of the master or employer, or of some person in the service of the master or employer, and entrusted by him with the duty of seeing that the ways, works, machinery and plant were in proper condition,—and it was further provided that it was not contributory negligence, or an assumption of the risk, on the part of the servant, to remain in the master's employment after knowledge of the defect, unless he was the servant whose duty it was to remedy the deefct.

Upon the trial of the case, the jury were instructed that the liability of the defendant was measured by the Alabama statute, and there is no complaint but that the proper rule of liability, under the Alabama statute, was given to the jury. Upon the trial, the defendant set up, as a bar to the plaintiff's action, Section 6115 of the Alabama Code of 1907. It appears from the statement of facts by the Court of Appeals, in deciding this case, that Section 3910, known as the Employer's Liability Law of Alabama, was in force before the Code of 1907 was adopted. Section 6115, of the Alabama Code, was put in the Code by the codifiers, and for the first time appears as the law in the Code of 1907. It is true that the Code of 1907 was adopted, as is claimed by plaintiff in error, by a legislative enactment in Alabama.

Section 6115, of the Alabama Code, provides "all actions brought under Sections 2486 (2486 is not involved in this case) and 3910, must be brought in a court of competent jurisdiction within the State of Alabama and not elsewhere."

Wherefore, the defendant, by reason of Section 6115, set up

that the section pleaded by plaintiff, to-wit, Section 3910, was irrelevant and immaterial, and by an amended answer further setting up Section 6115, the defendant contended that the Code of Alabama was a single statute, embracing both Sections 3910 and 6115, and setting up further, among other things, that to continue this action would be to deny the defendant the benefit of the "full faith and credit clause" as provided in article 4 and section 1 of the Federal constitution.

The trial court sustained a demurrer to the plea of defendant setting up Section 6115 as a bar.

There was a verdict for the plaintiff.

The defendant carried the case to the Court of Appeals of Georgia, and that court, in an elaborate opinion, decided against the defendant, holding that Section 6115 of the Alabama Code, would be treated as having no effect in Georgia, and that the Georgia courts would give effect to Section 3910, just as the courts of Alabama gave it effect.

BRIEF.

While full faith and credit shall be given in each state to the public acts of every other state, under article 4, section 1, of the Constitution,—this provision of the Constitution permits Congress by general laws, to prescribe the manner of proving such acts and the effects thereof.

Article 4, section 1, of Constitution.

The Act of Congress carrying out this constitutional provision, defines the giving of full faith and credit to the laws of one state by another state to be giving the same such faith and credit "as they have by law or usage in the courts or offices of the state, territory or country as aforesaid, from which they are taken."

Revised statutes, sections 905, 906.

Section 3910 of the Alabama Code which regulates the rights of employees against employers in personal injury cases, was the law of Alabama before the Code of 1907 was adopted, and in the Code of 1907 for the first time appears section 6115 which undertakes to require suits brought under section 3910 to be brought in courts of competent jurisdiction in the state of Alabama and not elsewhere. See decision of Court of Appeals below, i nthis case.

Section 6115 is without effect in Alabama, as courts of competent jurisdiction there tried all cases under section 3910 before section 6115 was ever adopted. It has no relation to any right of the employe against the employer or vice versa.

The effect of section 6115 is to demand of other states that full faith and credit be given to section 6115, and the only effect of section 6115 is to demand of other states that no faith and credit be given to section 3910.

The Federal Constitution and the Act of Congress hereinbefore quoted regulate the faith and credit which one state

must give to the laws of another, and no state has the right to encroach upon this subject. The effect of the Alabama enactment in 6115 of the Alabama Code is to deal only with the faith and credit given 3910 in other states. Such being its effect, section 6115 is void as an attempt to legislate upon a subject which has been covered by the Federal Constitution and the Act of Congress in pursuance thereof.

In as much as the Act of Congress requires one state to give to the law of another only such faith and credit as the enactment has by law or usage in the state enacting it, and in as much as Alabama in enacting section 3910 tries cases arising thereunder in its courts of competent jurisdiction, Georgia is igving the same faith and credit to section 3910 as Alabama gves by its law and usage, when Georgia tries such cases in its own courts of competent jurisdiction.

If Alabama can restrict the trial of cases under section 3910 to its own courts of competent jurisdiction, it has the right to restrict the trial of such cases to any other states it may select and prohibit such trial in any others, and to designate them by name. It could allow all such suits to be brought in Tennessee and Mississippi as well as in Alabama, and could prohibit them in Georgia and South Carolina. This shows that the effect of section 6115 is solely to deal with the faith and credit to be given to section 3910 in other states.

The decision of the Court of Appeals in this case, reported in 11th Ga. App., page 221, is conclusive in its reasoning, and holds first, upon a general review of the authorities that the enactment in section 6115 is without effect in Georgia and second, that the decision of the United States Supreme Court in the case of Atchison, etc. R. R. vs. Sowers, 213 U. S., page 55, which was a decision upon a similar statute of New Mexico, is controlling.

In the Sowers case New Mexico, by an enactment, which sought to regulate all common law and statutory rights of action for personal injuries, forbade the bringing of such suits

out of the state of New Mexico and required them to be brought in a certain court in New Mexico. The same statute enacted various other conditions, such as requirement of notice, service of list of witnesses and the like, before a cause of action for personal injuries could be enforced. The Supreme Court held in a suit brought in Texas, that faith and credit should be given to the New Mexico law in all the conditions of notice, service and the like, which affected the right of action, and that such conditions must be complied with, but that Texas had the right to disregard the requirement that suit should be brought in New Mexico, and such requirement had no extra territorial effect.

It could make no difference in the Sowers case whether the rights affected by the statute of New Mexico were statutory or common law. The Supreme Court recognized to the fullest extent that New Mexico had the right to abolish all common law rights or put any valid conditions upon them, and did actually give effect to all the conditions except the one as to the place of suit.

The effect of the New Mexico statute putting statutory conditions upon common law rights was to make those rights, as a whole, statutory, because New Mexico's control of common law rights was just as complete as its control of statutory rights.

An action under section 3910 of Alabama Code is essentially transitory. The attempt by section 6115 is to make it local. Alabama cannot bind other states by any arbitrary classification of an action as a local one, which is inherently transitory. Except as limited by the requirements of the Federal Constitution and the Act of Congress, each state is supreme as to laws or parts of laws of other states which it will give effect to.

There are many cases where the lex fori in enforcing the law of another state, has enforced the substantive rights created by such state through statute, and has ignored attempted conditions imposed by the lex loci which deal only with remedy.

In Wisconsin a statute of that state provided a right of action for death and that it should be brought only in some court of Wisconsin established by the constitution or laws of that state. If this condition were valid, it would exclude the jurisdiction of the Federal courts and of any other state court, but it was held not to be a valid condition imposed upon the right, by this court, the language of the Supreme Court of the United States being:

> "No condition imposed upon the right granted by a state which prevents one from availing himself of his constitutional privilege of appeal to the courts of the United States can be upheld. Such condition conflicts with the Federal Constitution and is nugatory and void."

Chicago, etc. Co. vs. Whitten, 13 Wallace, 270.

There is a case directly in point in the Supreme Court of Missouri and which arose upon a Kansas statute. The Kansas statute provided for a right of action for death or injury to a railroad employee by negligence of a fellow servant, and required a certain notice to defendant and service upon a certain agent of the railroad in the county in which the action is brought, and the entire provisions of the statute were claimed by the defendant to make the action local to Kansas. The Missouri court, in holding that the state of Kansas could not make the action local and could not destroy its transitory nature, sustained the bringing of the action in Missouri and used the following language:

> "Prescribing where the action shall be instituted has nothing to do with the creation of the right to the action."

Husted vs. Mo. Pac., R. Co. 128 S. W. Rep., 282.

In another case, the Supreme Court of Missouri passed upon the same contention that the law of Kansas which accompanied the creation of the right of action required the suit to be brought in Kansas and the Missouri court say:

> "Section 4821 (the Kansas statute) designates the jurisdiction in which suits shall be brought as against railroad

companies and other common carriers. This provision is interposed to defeat plaintiff's cause of action. A sufficient answer to this objection is that the law of Kansas in that respect does not obtain in this state. The jurisdiction of the courts of this state is regulated by its own Code."

Philes v. Mo. Pac. R. Co., 125 S. W. Rep., 553-555.

In the following cases the right of action was sustained in transitory actions in one state under the laws of another state, and various provisions of the laws of the lex loci regulating the remedy, which were claimed to be a part of the right itself, were disregarded.

Stewart vs. B. & O. R. Co., 168 U. S., 445.

Hollenbach vs. Elmore Contracting Co., 174 Fed. Rep., 845.

So. Ry. vs. Decker, 5th Ga. App., 21.

So. Ry. vs Robertson, 7th Ga. App., 154.

Holmes vs. Barclay, 4th La. Ann., 63.

It is a universal rule that the laws of the lex loci relating to remedy, even though those laws may have been parcel of the same general enactment in which the rights were created, do not apply to the lex fori, and it is clear that the Federal Constitution, and Act of Congress, upon the full faith and credit proposition, is not in conflict with the general current of authority, as a perusal of the following cases and text books will show.

Minor's Conflict of laws, section 192, page 476.

Storey's Conflict of laws, section 556, 558, 539, 540.

Stevens vs. Brown, 20th W. Va., 450.

If section 6115 of Alabama Code has extra territorial effect, a defendant incurring liability under section 3910, has but to leave the state and take his property with him and have immunity. The effect of section 6115 would be to prevent any suit against him in any other state, and as such defendant was out of the state of Alabama, the only law which rendered him liable

at the time his tort was committed could never be applied to him.

The following statement of the rule by the editor of the Lawyers' Reports, annotated, is found in the exhaustive notes to R. R. vs. Hurd, 56 L. R. A., 196, in reference to rights under foreign statutes:

> "The operation of that (the foreign) statute is exhausted when it fastens upon acts occurring within the state in which it is enacted, and out of them creates a complete right of action. When the court of another state takes jurisdiction of that right of action, it does so by virtue of its own inherent jurisdiction, acting upon the principle of comity, and not by virtue of the foreign statute. That statute, while the source of the right on which the jurisdiction acts, is not the source of the jurisdiction itself."

That there is no difference in principle between the enforcement of common law rights arising in another state and statutory rights therein arising is laid down by the same editor last quoted on page 197 of the same authority—as follows:

> "Comity will enforce rights not in their nature local and not contrary to the policy of the government of the tribunal, no matter where arising and without regard to whether they are of common law or of statutory origin. There is no difference in this respect between such rights; except in the presumption that common law rights in other states are similar to our own, and the absence of such presumption and consequent necessity of proof in regord to rights, merely statutory."

The following is a good statement of the rule by the Supreme Court of Minnesota:

> "Whenever—either by common law or statute, a right of action has become fixed and a legal liability incurred,—that liability if the action be transitory, may be enforced, and the right of action pursued in the courts of another state which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the state where it is sought to be enforced. * * * The statute of another state has, of course, no extra territorial

effect, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such case, the law of the place where the right was acquired or the liability was incurred will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the laws of the state where the action was brought."

Herrick vs. R. R., 35 Minn. 11 (47 Am. Rep., 772).

The entire subject of the place of suit relates to remedy. The law of Alabama could have created the right, and have made no reference in the enactment to venue or to the court which would take jurisdiction. It would be left to the general law of the state regulating remedies to determine where and in what court the suit should be brought.

It would be impossible to transplant all the remedies provided by the lex loci to the lex fori and make them parts and conditions of the rights granted. The jurisdiction and powers of the courts of the several states vary, and each state must apply its own machinery to rights granted in another state, as the machinery cannot be transferred. This applies to the forms of action, the process, the sufficiency of the pleadings et.c.

22nd A. & E. Enc. of Law, pages 1383, 1384.

4th Sutherland on Damages, Section 4280 (referring especially to Lord Campbell's acts).

The case of Galveston etc. Ry. vs. Wallace, 223 U. S., 481.

Cited by defendant, is not in point because it collaterally involved an Act of Congress which provided an exclusive remedy for the rights created, in certain tribunals of the United States. This court held that the statute providing the exclusive remedy, was not applicable, and in the course of the opinion, referred to the jurisdiction of the state courts in the enforcement of transitory causes of action. Of course, an Act of Congress is superior to the Act of the State. The Act of Congress is binding upon every State of the United States, both as to the rights granted and the exclusive remedies prescribed, because

th Act of Congress becomes the law of every State of the United States and is in no sense a foreign law of any State in which rights are claimed under it.

See nd Employer's Liability cases, 223d U. S., page 1, in which the court used the following language:

> "When Congress, in the exertion of the power confided to it by the Constitution, adopted that Act, it spoke for all the people and for all the States and thereby established a policy for all. That policy is as much the policy of Connecticut as if the Act had emanated from its own Legislature and should be respected accordingly in the courts of the State."

The Harrisburg, 119 U. S., cited by plaintiff in error, dealt with a time limitation put in as a condition to the creation of new rights. Of course, such time limitation is binding because it applies everywhere. It applies in the State which adopts it, and conditions the right there, and being one which can have full application everywhere, is enforced in other States. If Alabama had put the time limitation on section 3910, enforceable in Alabama, it would have been enforceable everywhere else.

The case of Davis vs. Mills, 194 U. S., 451.

Munos vs. Ry., 51st Fed., 188.

Stern vs. LaCompagnie, 110 Fed., 996.

The Edna, 185 Fed., 206.

All of these were cited by plaintiff in error and were cases of time limitation accompanying the creation of a new right.

The case of U. S. vs. Boomer, 183d Fed., 726, cited by plaintiff in error, involved an Act of Congress nothing like this.

The only case which the plaintiff in error cites, which is at all in point is the case of Coyne vs. So. Pac. in 155 Fed., 683. That case is a decision by the District Court of Utah and is in direct conflict with the Sowers case, as is admitted in brief of Plaintiff in error—the decision in the Coyne case holding that

are enactment of the common law by Nevada, with the imposition of a condition prohibiting suits outside of Nevada for personal injury cases, is valid and binding as to such condition, upon other States. On these identical facts the Supreme Court in the Sowers case, held that New Mexico could not impose such a condition.

ARGUMENT FOR DEFENDANT IN ERROR.

Constitutional Clause Involved.

The Constitution of the United States provides in article 4, section 1, that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; and the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effects thereof."

It will thus be seen that while the Constitution requires full faith and credit to be given in every other state to the acts of each state, that Congress is given the power to prescribe the manner in which these acts shall be proved and to provide for the effects thereof. To provide for the effects thereof manifestly means to provide for the effects which th proof of such acts, rcords or proceedings shall have when proved in the court of another state. Congress did proceed to legislate upon this subject and proceeded to define just what faith and credit should be given to the public acts of one state in the courts of another state, wherever it should become involved. This legislation is found in sections 905 and 906 of the Revised Statutes.

Act of Congress defines measure of faith and credit one state must give law of another state.

In deciding how far effect shall be given to the public acts of one state in the courts of another state, this statute provides, in section 906 that the records and exemplifications "so authenticated shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory or country as aforesaid from which they are taken."

Substantially the same thing is in section 905 of the revised statutes.

Section 905 deals with the acts of the Legislature of any state or territory and also with the records and judicial proceedings of the courts of any state or territory or any country. Section 906 deals with all records and exemplifications of books which may be kept in any public office of any state or territory or of any country subject to the jurisdiction of the United States not appertaining to a court.

In both sections 905 and 906 the legislation which Congress was enacting under the section of the Constitution just quoted requires the courts of the states other than the ones in which the legislative enactment occurs to give "such faith and credit" as these legislative acts have "by law or usage in the courts" of the state from which they are taken.

In What Cases This Question Can Arise.

Of course, the construction of this Act of Congress could never be involved except in a case where the state in which the cause arises acquires jurisdiction of the defendant. That jurisdiction must be acquired either by personal service upon the defendant or by attachment of his property; and in the case at bar there can be no question but that the jurisdiction was properly acquired of the defendant.

Jurisdiction of the defendant for the purposes of a transitory action thus being acquired,—the question arises: when does one state give such faith and credit to the legislative act of another state? The Act of Congress itself furnishes the key and defines the extent to which this faith and credit must be given, and we find that sufficient faith and credit is given to the legislative enactment of another state when that enactment is given such faith and credit as it has by law or usage in the courts of the state in which the enactment takes place. It must treat the statute just as the court of the state which enacted it must treat it. It must give just the same effect to the statute as the court of the state which enacted it must give—neither more or less.

Limitation as to Place Enacted After Alabama Employers Liability Law.

As appears from the decision of the Court of Appeals of Georgia on page 20 of the printed record in this case—section 3910, as it appears in the Code of Alabama of 1907—which is the Employer's Liability Act of Alabama, which is involved in the present case,—was enacted before the Code of 1907 was enacted, which for the first time contains section 6115 which deals with the venue of actions. The language of the Court of Appeals of Georgia on this subject is as follows: "Section 6115 was adopted with the Code of 1907 in solido, some time after the passage of the act contained in section 3910; and in the argument for the defendant in error some importance is attached to this fact. We prefer to deal with the point as if the restriction of the right to sue to courts of competent jurisdiction in Alabama had been part and parcel of the statute creating the cause of action."

Defendant in error could have recovered on common law principles contained in Alabama law.

It will be seen that section 3910 is in many particulars a mere re-enactment of the common law. The Codes of many states—and Georgia is a forcible illustration of this rule—contain codifications of mere common law principles. As applying to the case at bar, the common law principles embodied in the act of the Alabama Legislature are controlling. Plaintiff who was an engineer, was injured by a movement of his engine because of its defective condition, which was known to the defendant, or should have been known in the exercise of its ordinary duty of inspection. His case was not based on the negligence of a fellow servant and did not come under any of the various provisions of the Alabama statute which add to or vary the common law, but under those provisions which in effect re-enacted the common law. His case rested purely and simply upon the failure of the master to furnish hi mreasonably

safe appliances and upon the negligence of the master in so failing to furnish.

The Court of Appeals of Georgia decided this in effect by the following language, which appears on page 25 of the printed record: "It is true that the right created by the Alabama statute now under consideration did exist at common law, although there are certain statutory incidents and qualifications which were not recognized at common law."

Alabama Employer's Liability Law complete,—not added to or varies by limitation as to place of suit.

Section 3910 of the Alabama Code appears in plaintiff's declaration on pages 10 and 11 of the printed record. It is complete in itself, and as just stated, was a Legislative enactment of Alabama prior to the Code of 1907. This Act, neither as originally adopted nor as it appears in the Code of 1907 contains any restriction of the right to sue and does not limit actions brought under it to courts of Alabama.

When the Code of 1907 was adopted, under the head of venue appears an enactment in the following language: "All actions brought under sections 2486 and 3910 must be brought in a court of competent jurisdiction within the state of Alabama and not elsewhere."

It is a far fetched argument to say that this venue section is any limitation on the right granted in section 3910. It does not use the language of a limitation or a condition; it simply undertake to provide a rule of action for persons who invoke the sections of the Code named. It is in a part of the Alabama Code dealing only with remedies, to-wit: on the subject of venue.

Plaintiff's rights in no way depend on section 6115. The plaintiff did not invoke it; the transaction between the plaintiff and the defendant corporation which gave rise to plaintiff's liability was complete without any reference to section 6115 and it was brought into the case by the defendant's plea.

It is plaintiff in error and not defendant in error, whose contention violates "Full faith and credit" clause of Federal law.

Plaintiff in Error in this case is invoking the full faith and credit clause of the Federal Constitution herein quoted. We have not been able to find any reference in the brief of Plaintiff in Error to the acts of Congress contained in sections 905 and 906 of the revised statutes carrying out the full faith and credit clause.

A perusal of this Act of Congress will show that it is not the defendant in error who is proceeding in the teeth of the Federal law, but that it is the plaintiff in error who makes a claim in violation thereof.

The Act of Congress requires that both states must be treated alike; that the state enacting the law and the state enforcing the law must look at it from the same standpoint, give it the same effect and neither add anything to it or subtract anything from it.

The Act of Congress requires the state enforcing the law of another state to give it only the same faith and credit as the act has by "law or usage" in the state enacting it. The clear intent of this statute is to put both states upon precisely the same footing as to the enforcement of the laws of either. There is to be no discrimination. The state where the trial takes place must act exactly towards the law as the state which creates the law.

Alabama, by the terms of section 6115—can enforce this Employer's Liability Act in any court of competent jurisdiction within its borders. Georgia can likewise enforce this act in any court of competent jurisdiction within its borders. In no other way can Georgia give this act the same force and effect which it has by law and usage in Alabama. What effect that law would have in Alabama, it must have in Georgia. The provision in the Alabama Code denying Georgia the same right to enforce this law which Alabama has would be in the teeth

of the Act of Congress. The Act of Congress affirmatively gives Georgia the same right to enforce it which Alabama has, but Alabama would be assuming a superior right and would be in the position of claiming that she has a Legislative enactment which can be given full faith and credit in one state and cannot in another, even as applicable to a transitory action where that state has jurisdiction of the party.

Analysis of Claim of Plaintiff in Error.

So far from the Constitution of the United States protecting Alabama in the enactment of the law claimed by Plaintiff in Error in this case—the same is absolutely prohibited by both the letter and spirit of the Act of Congress, which requires Georgia to give only such faith and credit to this act as it has in Alabama. Alabama in creating this right, which by all standards is a transitory action, cannot say: "I only can take cognizance of this right." Whenever it creates the right and undertakes to forbid its enforcement out of the state of Alabama, it assumes to give the state of Alabama the right to give faith and credit to the act and denies it to other states. It is bound to allow to other states who have proper jurisdiction of the parties, the right to give just as much force and effect to the act as Alabama itself does.

Alabama, after enactment of limitation as to place, in section 6115, enforces employer's liability law in section 3910, precisely as she did before the passage of 6115. No change worked in Alabama.

In the case at bar, every provision of the Alabama act was given effect just as it would have been in a court of Alabama. It is no answer to say that while Alabama enforces the law, it enforces it because of the statement in section 6115 that jurisdiction rests only in courts of competent jurisdiction and not elsewhere and that therefore Alabama is giving full faith and credit to all the provisions of this act, and the courts of Georgia are not, because they are prohibited by the clause just quoted.

This argument is without force. The statement in section 6115 of the Alabama Code confining jurisdiction to courts of competent jurisdiction in Alabama is a mere abstract declaration without any meaning whatsoever. Strike it absolutely from the Code and the courts of competent jurisdiction in Alabama would proceed to try these cases. This clause of the Act can never be invoked in any case tried in Alabama. It can never be brought into question. Necessarily every suit brought in Alabama must be sued in a court of competent jurisdiction. Such a statement as to actions brought in Alabama amounts to nothing, limits no right and creates no new right. The only parts of this law which can ever become involved in Alabama and which, in the language of the Act of Congress "by usage and by law" are enforced in Alabama, are those parts which give rise to a right of action to employees.

Therefore we say with confidence that this law must be given the same effect in every other state as by usage and by law it is given in Alabama. In other words: it can be sued on in Georgia in any court which Georgia allows to take jurisdiction of such actions.

To give effect to the part of the law just quoted is to give effect to a claim of superior right on the part of Alabama as to the enforcement of one of its laws.

Defendant in error invokes "Full faith and credit" clause to annihilate section 6115.

Is it not clear that the defendant in error in this case, in invoking the Alabama law and in seeking to have it applied in Georgia is carrying out the letter and spirit of the full faith and credit clause of the Constitution and the Act of Congress thereunder? And it is the Plaintiff in error who is seeking, not such rights under one of Alabama's acts as "by law or usage" it has in the courts of that state, but is seeking a superior right, to-wit: a right to prohibit any other state from giving full faith and credit to Alabama's enactment.

The attitude of the plaintiff in error, instead of being an attitude of seeking to enforce Alabama's law, is that of undertaking to prevent the enforcement of such law.

Surely it was never intended by the terms of the Act of Congress to give any one state the superior or exclusive privilege to enforce some right created by it,—nor was it intended to give one state a superior right in recognizing and giving faith and credit to its own laws. Can Alabama say, "I am the only state which has the right to give faith and credit to one of my own laws?" Can Alabama say: "I will deny to any other state the right to give faith and credit to one of my laws?" Can Alabama invoke that clause of the Federal Constitution which was intended to protect it as to any enactment passed by it and which was intended to give its enactment full faith and credit in another state, for the purpose of sustaining one of its enactments which cuts off from that other state the right to give another of Alabama's enactment full faith and credit?

Is not Alabama's enactment, which seeks to prevent another state from giving full faith and credit to rights created by it, in the teeth of the spirit and letter of the Act of Congress and a mere effort to defeat this clause of the constitution? Therefore is not the sister state justified in treating as a mere nullity this effort to prevent the application in spirit of the Federal Constitution?

Concrete illustrations of how Alabama's limitation in section 6115 will operate.

Suppose an action were brought in Georgia between parties over whom the Georgia courts had jurisdiction. Suppose it should be to the defendant's interest to set up against the plaintiff, as in some cases of set off it might be done—rights growing up out of this Alabama Employer's Liability Act: Could the plaintiff reply, "Those rights cannot be set up in Georgia, even as a defense, because, while Alabama creates them, it allows only its own courts to enforce them?

Suppose a defendant committed a tort and rendered himself liable under this Alabama employers statute. It is a transitory action and follows the defendant under common law principles wherever he goes. The defendant comes to Georgia, which is thus the only state which can acquire jurisdiction over him. He has property only in Georgia. Here we have a plain illustration of the effect of the Alabama statute. The right created exists only under the Alabama statute, and yet Georgia which is the only state which can enforce that right, cannot do so because of the Alabama law which confines the remedy to Alabama. This man would escape liability in both states.

Clearly, any law which undertakes to give the state creating a privilege, a superior right in its enforcement is as unconstitutional as a law of the state of trial which refused to give any faith and credit to the other state's law.

In a case of jurisdiction Georgia must give as much faith and credit to Alabama's law as Alabama does.

In this case Georgia would have just as much right to provide that it would give no faith and credit to any law of Alabama as Alabama has to provide such a rule for Georgia. Georgia in providing such a rule against Alabama which would ignore Alabama's creation of rights, would violate the Act of Congress because it would fail to give full force and effect to the Legislative enactment of its sister state.

If Georgia would violate the rule laid down by the Act of Congress in refusing to enforce rights created under Alabama laws as Alabama itself enacted and enforced them—is not Alabama equally as much a violator of this Act of Congress when it says that Georgia shall not enforce such rights? Can Alabama do this under the guise of a limitation of a right or under any other guise? If such an attempt be called a condition on the right itself, is not it a condition which is in the teeth of the law, and particularly of the Act of Congress; and is not such a condition void and the balance of the Alabama law which creates substantive rights valid?

If Georgia has no right to decline, in a proper case, to enforce the legislative enactment of Alabama, can Alabama by its act compel Georgia to decline to enforce Alabama's enactment?

Section 6115 can not be called condition to rights given by section 3910.

The declaration in section 6115 of the Aabama Code forbidding suits outside of Alabama is no limitation on the rights created by the Employer's Liability Act at all. It does not condition those rights in any legal sense of the word. It is a mere declaration in the Alabama Code that no faith and credit shall be given to the rights created by the Alabama Employer's Liability Law, except in Alabama.

Alabama cannot thus isolate itself under the Federal Constitution; it belongs to a sisterhood of states; there is a common tie between them. If the Federal Constitution did not intervene, there can be no question but that the Georgia courts could enforce any right of action which they saw fit. If it were not for the Federal Constitution and Act of Congress, there would be no right whatever of appeal to this court. In as much as the Plaintiff in Error appeals to this court under the Federal Constitution and Act of Congress, it must take that Constitution and those enactments as it finds them in letter and in spirit. It cannot invoke them in claiming the protection of its law in another state and then deny that portion of the Act of Congress which requires the two states to be put on identically the same footing in the enforcement of the law.

If the abstract provision contained in section 6115 is given any effect at all consistently with the Act of Congress, there should be read into it the name of every state in which the Alabama enactment might be involved. In other words, in a suit in Georgia, there should be read into the act that all actions upon the Employer's Liability Law of Alabama must be brought in a court of competent jurisdiction within the state of Alabama (or Georgia or whatever state the action is brought in) and

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not elsewhere. Such a provision would be the use of mere idle words because it is exactly understood that every action must be brought in a court of competent jurisdiction.

It is idle to say that Alabama can attach any provision whatsoever to a right created by it. It cannot attach a provision in the teeth of the Act of Congress; it cannot attach one which limits the faith and credit to be given to its enactment to itself alone. It cannot prevent other states from giving as much faith and credit to its enactment as it does.

The only effect of this Alabama enactment would be to give Alabama a superior right in the enforcement of this law. There is no legitimate relation between this law and any right created by the Employer's Liability Act. It is not legitimately a part of that law at all. As hereinbefore stated,—a man incurring a liability under this Alabama law, could defeat it by leaving the state, because he could not be sued elsewhere if 6115 is of force, and the wrong could never be redressed unless he voluntarily came back into the state of Alabama.

Alabama has no right to insert a condition in a right created by it, which only the courts of Alabama can comply with or recognize. In doing so, it is giving more faith and credit to its own enactment than exists in other states of the Union. Alabama cannot invoke the full faith and credit clause in support of such a restriction, because the full faith and credit clause as evidenced by the Act of Congress puts both states on the same footing.

An express remedy no necessary condition to creating a right; a right may be created without a specific remedy.

Plaintiff in Error makes the claim that the rights of the Defendant in Error are measured by the Alabama Employer's Liability Law. It does not deny that this is a transitory action, yet it insists that as to those rights existing under the Alabama law,—Alabama has a right to demand that Georgia do not enforce.

As the Court of Appeals of Georgia remarked on page 24 of the printed record: "The forum in which a right must be enforced is no part of the right. A right might be created and no tribunal be erected in which to enforce it. But the right would none the less exist. It would simply be inoperative or remain in abeyance until a tribunal was invested with jurisdiction to enforce it. It is much like the case where an act is prohibited by law but no penalty i sprescribed. One who commits the act violates the law, even though no penalty be attached to the violation."

Further on, the Court of Appeals used this following language on page 25 of the printed record: "In other words, when suit is brought in one of the Georgia courts under the Alabama statute, the Georgia court is substituted for the Alabama tribunal, and will enforce the right in the same way, according to the same principles and to the same effect as it would be enforced in the state of Alabama. More than this, we will construe the statute as it is construed by the highest court of the state of Alabama and we will give due effect to all of the laws of Alabama which affect the right created by the statute. The statute of Alabama is the source of the right on which the jurisdiction acts, but it is not the source of the jurisdiction itself. We look to the act to determine the right, but we refuse to look to the law of Alabama to determine what rights the courts of this state will enforce, or to fix the jurisdiction of its tribunals."

Section 3910 and 6115 are separate laws; even if enacted at the same time they are independent and capable of severance.

There are many cases where legislation is capable of severance or separation into valid and void parts. There is no force in the proposition that all the provisions of the Alabama law must be taken and given equal effect, or none at all.

Section 6115 can be eliminated without in any way affecting the provisions of 3910.

By enacting section 6115 Alabama determines extent to which other states can enforce section 3910, to-wit: in their courts of competent jurisdiction.

Alabama has no right to give its own courts the enforcement of this act and deny it to other courts. This very clause, to-wit: section 6115, giving its own courts jurisdiction, determines that the same effect and usage must be given the law in other states. This section 6115, instead of defeating the jurisdiction of Georgia, furnishes the standard by which Georgia has jurisdiction. Just as Alabama gives its own courts jurisdiction, the Constitution of the United States and the Act of Congress gives Georgia jurisdiction. Only that portion of the Alabama Act which uses the language that no jurisdiction exists elsewhere is ignored.

Alabama in giving to its own courts jurisdiction, furnishes the standard by which we act. It furnishes a reason for giving the courts of Georgia jurisdiction. How is this act given full force and effect by the law and usage of Alabama in the sense of the Act of Congress? It is given force and effect by giving the courts of competent jurisdiction in Alabama the right to try these cases. This being the case, the Act of Congress requires that identically the same force and effect shall be given to the Act in Georgia. As the useage and law of Alabama allows its courts to try these cases, so by the same standard they may be tried in Georgia.

Section 6115 is an attempt to give faith and credit exclusively in Alabama to section 3910. Under the Act of Congress the only right from the Alabama view point is that as much faith and credit be given the Alabama law in Georgia as is given it in Alabama. Alabama's rights do not lie in the direction of insisting that Georgia deny rights created by its statute, but its rights are to insist that Georgia recognize rights created by its legislature just as Alabama recognizes them, no more and no less.

Alabama, by section 6115, insists that other states give no faith and credit to section 3910.

Alabama, under section 6115, insists that no faith and credit be given to section 3910 by other states. Clearly the only right of Alabama is to insist that under the Federal law other states give effect to section 3910, not that other states deny 3910.

Section 6115 gives no rights;—it is only a command in effect to other states to hold off from giving faith and credit to section 3910, which is the real law in controversy. The real question in controversy here and the real rights sought to be applied are those granted by section 3910,—the Employer's Liability law. Alabama can only say: "In such way as I give effect to 3910, you other states must do likewise." Rather Alabama does not say this, but the Federal Constitution and Act of Congress in pursuance of it in behalf of all the states, makes this declaration.

Section 6115 merely lays down an abstract rule as to the faith and credit which shall be given section 3910 in other states as well as in Alabama. It discriminates between the states in the faith and credit to be given 3910. Section 6115 lays down a command and does not undertake to regulate in any way the relation of master and seravtnt.

Georgia can ignore the command in section 6115 and can enforce section 3910 just as Alabama enforces it.

Alabama, by enacting section 6115, is infringing upon territory covered by full faith and credit clause of Federal Constitution.

It is clear that section 6115 is undertaking to regulate the conduct of other states in the matter of faith and credit which they shall give to Alabama laws. Alabama cannot do this. The Act of Congress enacted in pursuance of the Federal Constitution has undertaken to do this. Alabama cannot touch upon the rights of other states in enforcing its laws.

Any attempt to do so is not a legitimate condition of any right granted. It has no relation to any right granted. The mere effect of such a condition as is found in 6115, is to determine the manner in which other states shall pass upon the rights granted by an enactment of Alabama.

Section 6115 infringes on every ground which the full faith and credit clause of the constitution is intended to operate on, and interferes with the operation of the Federal law.

If Alabama can discriminate in its own favor as to the rights acquired under section 3910, it can run over the whole field of legislation and pick out such matters as shall be given full faith and credit in other states and select likewise such matters or rights as shall be given full faith and credit only in Alabama. If all other states should follow the same example, it would cause chaos.

To put the matter more tersely, Alabama demands that Georgia give faith and credit to section 6115, which section in turn demands that Georgia refuse to give faith and credit to 3910. Georgia's reply is: "I will give faith and credit to the law which your state enforces. I will not enforce your demand which undertakes to dictate to me as to which of your laws I shall give faith and credit to. I will enforce the law which you yourself enforce. Under the Federal Constitution, I am giving faith and credit to your law when I enforce it, just as you do."

Section 6115 cannot be given force on the claim that it is a condition of the rights granted on 3910. The point is that no such condition can have any validity and such a condition is an effort to regulate the extent to which Alabama's law shall be recognized in other states, and nothing more. It is a mere effort to determine the territorial effect of Alabama's law.

Alabama demands in section 6115 that we give full faith and credit to section 6115; but section 6115 does nothing so far as Georgia is concerned, except to demand that we give no faith and credit to 3910.

The only rights in controversy in the case brought by George are those set forth in 3910. There is no pretense that the relation of employer or employe is regulated in any way by section 6115. Section 6115 does not undertake to take from or add to section 3910 anything. Section 6115 does not in any way deal wtih the subject of 3910.

Section 6115 affects nothing but the status of 3910 in other states.

The object of the Federal enactment is to require states to give full faith and credit to some act of a state creating a right, not to give full faith and credit to an enactment of a state, the only purpose of which is to deny the other states the right to give full faith and credit to an enactment creating rights.

Of course, in the creation of any right by a state, or in the regulation of master and servant, the state making the enactment can limit the right as to time, demands necessary before the action is instituted, and in many other ways.

But section 6115 of the Alabama Code is not in this class and is a mere effort to regulate or to say to other states what laws of Alabama they shall give faith and credit to.

Whether 6115 be called a condition or what not,—its language and purpose is to give full faith and credit to section 3910 only in Alabama, but section 6115 kills its own purpose, because in giving section 3910 full force in Alabama, it thereby makes the Act of Congress instantly applicable, because the Act of Congress gives 3910 the same faith and credit in other states which it has by "law and usage" in Alabama.

Status in Alabama under section 3910 wholly unchanged by section 6115.

Section 6115 is no condition or limitation which can in any possible view have any effect in Alabama; therefore it is idle to say that 6115 is having effect in Alabama by reason of the fact that the suits are brought in Alabama.

All that section 6115 attempts to do is an enactment of the bald platitude that "courts of competent jurisdiction" in Alabama shall decide all cases under section 3910. Before the passage of section 6115, only courts of competent jurisdiction in Alabama decided these cases. No court in Alabama would or could entertain the question as to whether a court outside of the state could enforce section 3910. Therefore, 3910, which was enforced in Alabama long before 6115 was enacted, was enforced after its enactment just as it was before by courts of competent jurisdiction. So far as giving any particular Alabama court jurisdiction is concerned,—section 6115 is a glittering generality, wholly unnecessary and without any effect. Section 6115 does not undertake to erect any new tribunals or to point out any particular courts which shall take cognizance under section 3910. It leaves the matter to the courts already in existence and to the courts which already had jurisdiction.

In as much as section 6115 worked no change in Alabama and had no effect upon the right granted in 3910 in Alabama, its only effect could be an extra territorial effort to affect suits brought in other states.

There is no condition or limitation in section 6115 requiring anything to be done in Alabama in order for a plaintiff to avail himself of section 3910. Things were left in Alabama, after the passage of section 6115, precisely as they were before its passage.

While one state must give effect to all limitations or qualifications of a particular right granted in another state,—section 6115 is not this kind of right. It is not the thing which another state can or should give faith and credit to, under the Federal law. Section 6115 is attempting itself to decide the whole question of faith and credit for other states as to 3910. Section 6115 demands nothing whatever except the regulation of the question which Congress is attempting to regulate in sections 905 and 906 of the revised statutes. Congress is undertaking to define the measure of faith and credit which must be given to the laws

of other states and it defines that measure of faith and credit as such faith and credit as the enactment has "by law or usage in the courts of the state from which they are taken." For Georgia to give faith and credit to 6115 would be to allow another state to determine for Georgia the question which this Federal enactment has undertaken to decide.

Alabama has as much right to select other designated states for its laws to be effectual in as Alabama.

As showing the uncertainty which legislation such as 6115 would beget—Alabama has as much right to give the right of action under 3910 to some other state as it has to its own state. Alabama could just as well enact that Tennessee and no other state could enforce rights granted under 3910 or that South Carolina or Virginia could enforce them and that Mississippi and Georgia could not. It has no more right to condition the place of trial of actions under 3910 to Alabama than to any other state. It could pick out states to which it felt friendly and allow this right of action; it could select other states to which it did not feel so friendly and deny the right of action; it can do all this if it can restrict the right of action to its own courts.

Georga's policy settled by decision below.

The decision of the Georgia Court of Appeals is conclusive as to what foreign laws Georgia's policy will recognize. The only question which the Supreme Court is asked to pass upon is the extent to which George must recognize the Alabama law in carrying out the spirit of the "full faith and credit" clause of the Constitution, and the Acts of Congress in pursuance thereof.

Whether Georgia ought, or ought not, as matter of policy or construction, recognize Section 6115 of the Alabama Code, as a condition to Section 3910 is a matter alone for the Georgia courts to decide. Georgia's refusal to recognize some valid

part of the foreign law must go to the extent of failing to give to that foreign law the full faith and credit which it has by "law and usage" in the State of its enactment.

In the case of St. Louis etc. Railroad vs. Taylor, 210 U. S., p. 281, an action was brought in Arkansas for a homicide in the Indian Territory, in which territory a right of action had been given for a wrongful death. It was contended by the railway company in Arkansas, that the courts of Arkansas had no jurisdiction of causes of action arising under laws of the Indian Territory, which was under the direct jurisdiction of Congress. It was held that this raised no Federal Constitutional question whatever, and Mr. Justice Moody, on page 285 of the decision, in disposing of it, uses the following language which effectually disposes of the case at bar:

> "This contention does not present a Federal question. Each State may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and specifically how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside of its borders; (citing authorities). We have, therefore, no authority to review the decision of the State court so far as it holds that there was jurisdiction to hear and determine this case. On that question the decision of that court is final."

Analysis of the Decision Below.

The Georgia Appellate Court held (first) upon its own line of reasoning, that the prohibition in Section 6115 of the Alabama Code had no effect in Georgia, and that Georgia would give effect to Section 3910 just as the Alabama courts would, and held (secondly) that the question was not an open one, because the case of Atchison etc. Railway vs. Sowers, 213 U. S., 55, settled the question against the plaintiff in error, and in favor of the jurisdiction of Georgia.

The decision of the Appellate Court of Georgia in this case, as reported in 11th Georgia Appeals, 221, contains convinicng reasoning, and in this argument we wish to quote the following extracts from it: on p. 224:

> "We prefer, however, to deal with the point as if the restriction of the right to sue to the courts of competent jurisdiction in Alabama had been part and parcel of the statute creating the cause of action. It is broadly contended by counsel for the plaintiff in error that the full faith and credit clause of the Federal Constitution would compel the courts of Georgia to give effect to the limitation contained in Section 6115 and to refuse to take cognizance of a suit based upon the provisions of Section 3910. In other words, it is insisted that the State of Alabama has the power to create a right and limit its enforcement to the courts of that State. Counsel for the defendant in error reply that the laws of Alabama can have no extra territorial effect; that while any condition or limitation prescribed by the legislature of that State which goes merely to the manner in which the right shall be exercised is binding upon the courts of that State, yet that all conditions or limitations which affect merely the remedy have no force beyond the limits of the State, but are matters as to which the lex fori controls.
>
> "It is, of course, well settled that the courts of one State will enforce any transitory cause of action arising in another State which is not opposed to the settled policy of the State wherein it is sought to enforce the right. The question, therefore, presented for our determination is whether the legislature of one State can create a statutory right which givs rise to a transitory cause of action, and at the same time localize the right so as to prevent its enforcement beyond the limits of the State. In the early history of this country Congress passed acts, in execution of the constitutional grant of power above quoted, which provided that the acts of legislatures of the several States should have such faith and credit given to them in every State of the United States as they have by law and usage in the court of the State in which they were enacted. 1 Stat. at Large, ch. 122, p. 11; U. S. Comp. Stat. 1901,

p. 577. Does the provision of this Tct of Congress, construed in connection with Section 1, article 4 of the Federal Constitution, compel the courts of Georgia to give effect to Section 6115 of the Code of Alabama, denying to a person injured in the State of Alabama, on account of negligence of one domiciled in that State, the right to maintain an action under the provisions of 3190 (3910) of the Code of that State in any court other than the courts of competent jurisdiction of that State? This court has twice had under consideration the identical question presented by this assignment of error. In Southern Railway Co. v. Decker, 5 Ga. App., 21, 34, in referring to Section 6115 of the Code of Alabama of 1907, it was said: 'Even if this statute had been in force at the time the suit was instituted, it would have been the duty of the courts of this State to disregard it. Our own sense of justice, subject to the guidance of the lawmaking power of this State, determines solely and alone what laws, domestic or foreign, we will enforce; and his discretion is subject to neither limitation nor extension by the legislature of any other State.'"

Further on in the opinion, on page 225, the court says:

"Prior to the passage of the Act of Congress in execution of the full faith and credit clause of the Federal Constitution, the question as to whether laws of a foreign State would be enforced by the courts of another State was determined largely as a matter of comity between the States. As was said by Judge Nisbet in Cox vs. Adams, 2 Ga., 164: 'The laws of a country, as a general principle, have no binding force beyond its territorial limits. Their authority is admitted in other States, not ex proprio vigore, but ex comitate; not on account of any inherent force in the law itself beyond the limits of the State which enacts it, but because of the comity of nations: Each State has the unquestioned right to legislate upon the rights and obligations of its own citizens, according to its own views of right and expediency. So, also, every independent State will judge for itself how far it shall or shall not admit the force of foreign laws within its own territory. These principles, as well as those we shall further declare in this opinion, are applicable to the States of our own Union, so far as they

are not modified by our peculiar system—so far as the Constitution of the Union does not limit, restrain or alter them.'"

Further on, in the opinion, the Georgia Court of Appeals in this case makes, on pages 229, 230 and 231, the following reply to contention of counsel for plaintiff in error that the Sowers case, in 213 U. S. is not controlling:

> Counsel for the plaintiff in error argue that the distinction between the case of Atchison R. Co. v. Sowers, supra, and the one now under consideration is that in the former case the substantive cause of action existed at common law, and did not depend upon statute. They contend that while a State would not have the right to restrict to its own courts the enforcement of a common law liability, it does have the right to so limit created by its statutes: in other words, that as the State need not have created the liability, it has a right to prescribe the forum in which the cause of action should be enforced. It seems to us that this distinction cannot be sustained, and that the purpose and intent of the decision of the United States Supreme Court was to hold broadly that the courts of each State have a right to determine for themselves, subject only to the limitations of the Federal Constitution and the Acts of Congress passed in pursuance thereof, what transitory causes of action they will enforce, and that it is beyond the power of the State creating the cause of action to deny the right to enforce it in the courts of another State. It seems to us inaccurate to say that the limitation sought to be imposed by the legislature of Alabama is a condition affixed to the right created by the statute. It is really a limitation or restriction which goes merely to the remedy. Remedy for the enforcement of a right embraces not only the procedure for its enforcement, but also the forum in which it shall be enforced. The forum in which a right must be enforced is no part of the right. A right might be created and no tribunal be erected in which to enforce it, but the right would none the less exist. It would simply be inoperative or remain in abeyance until a tribunal was invested with jurisdiction to enforce it. It is much like the case where an act is prohibited by law, but no penalty is prescribed. One

who committed the act violates the law, even though no penalty be attached to the violation. The Constitution of the United States requires a State to deliver up a fugitive from justice from another State. The fact that no method is prescribed for compelling obedience to this mandate does not destroy or affect the right of one State to demand the surrender of the fugitive, or the obligation of the State to which the fugitive has fled to deliver him up. The right now claimed will be enforced in the courts of Georgia in strict accordance with the statute of Alabama, as will also every condition of that statute which relates to the right. In other words, when suit is brought in one of the Georgia courts under the Alabama statute, the Georgia court is substituted for the Alabama tribunal, and will enforce the right in the same way, according to the same principles and to the same effect, as it would be enforced in the State of Alabama. More than this, we will construe the statute as it is construed by the highest court of the State of Alabama, and will give due effect to all the laws of Alabama which affect the right created by the statute. The statute of Alabama is the source of the right on which the jurisdiction acts, but it is not the source of the jurisdiction itself. We look to the act to determine the right, but we refuse to look to the law of Alabama to determine what rights the courts of this State will enforce, or to fix the jurisdiction of its tribunals. Cases are tried in Alabama upon the settled principles of the common law, and they are tried in Georgia upon the same principles and substantially according to the same procedure. While the common law is presumed to be of force in nearly all of the American States, there is no such thing as a common law liability, except as such liability may be recognized by statute. While the right may be founded upon the common law, and the origin of the right may be derived from the common law, it is none the less statutory, since the common law has no force and effect in the several States except as it may have been adopted by statute. Alabama has as much right to withhold its sanction of a right existing at common law as it has to withhold legislative recognition of a new right, not existing at common law. It is true that the right created by the Alabama statute now under consideration did exist at common law, although there are certain statutory incidents

and qualifications which were not recognized at common law. But without reference to this, even if the right itself had been one which did not exist at common law, if the statute creates a transitory cause of action not opposed to the settled policy of this State, the courts of Georgia will not close their doors to one claiming a right under the statute, notwithstanding the amendment to the law, which seeks to confine the right to sue to the courts of competent jurisdiction within the State of Alabama."

The Sowers decision by the United States Supreme Court is controlling.

We come now to our contention that the case of Atchison etc. Railway vs. Sowers, 213 U. S., 55, is a controlling case in favor of defendant in error.

> "The statute of New Mexico, invoked in the Sowers case provided "whereas it has become customary for persons claiming damages for personal injuries received in this Territory to institute and maintain suits for the recovery thereof in other States and Territories, to the increased annoyance and manifest injury and oppression of the business interests of this Terirtory, and the deroagtion of the courts thereof."

Therefore it was enacted that after the passage of that act there should be no civil liability under either the common law or any statute of the Territory, for any injuries or death occurring in the Territory, unless the persons claiming damages should within ninety days serve the corporation at least thirty days before commencing the suit, with an affidavit stating certain facts, and also fixing the limitation within which the action should be brought, and it was further provided that the right of action is given "only on the understanding that the foregoing conditions precedent are made a part of the law under which the right to recover can exist for such injuries." And among other things, in section 1 it was provided that there should be no civil liability for such cause unless the person claiming the damages should commence action in the district court of New Mexico in the county where either the plaintiff or defendant resided,

or where the corporation had its principal place of business. And in section 3 it was provided that it was not lawful for any person to bring such action in any other State or Territory.

An action was brought in Texas for injuries sustained in New Mexico, and the statute just quoted was pleaded as a defense. The Texas courts overruled the defense, holding that while all the conditions precedent to the suit prsecribed by the Act of New Mexico, such as giving notice, furnishing list of witnesses, making affidavit and the like, would be enforced in Texas, that the courts of Texas would not be governed by that portion of the Act which limited the right to sue to courts of New Mexico. This was the question presented to the Supreme Court for decision in the Sowers case, and the Sowers case holds that the condition limiting suits to the courts of New Mexico was nugatory. Nor was the Sowers decision put upon the ground that the rights being dealt with by the New Mexico statutes were common law rights. New Mexico had the right to repeal common law rights altogether, or to put any valid limitation upon common law rights, and it had as much authority to put limitations upon the assertion of common law rights or to qualify them as it did to limit or qualify statutory rights. If the common law is enforced in a State, it is enforced because that State, either under its constitution or statutes, allows or recognizes or re-enacts the common law. Common law, as enforced in the States of the United States, exists only under the allowance and authority of the law-making power of that State. That law-making power can put any valid condition on that common law right, just as it could put it on a new right created by it. The statute of New Mexico, in placing additional restrictions around common law rights, in effect re-enacted the common law, plus the restrictions, and as a whole the effect was to make a new statute out of the whole legislation.

An action for personal injuries is just as transitory when it exists under the statute of a State as when it exists under the common law.

As was stated by the Court of Appeals of Georgia, in the case of Southern Railway vs. Miller, 1st Georgia Appeals, pp. 616-621 (which decision was affirmed by the Supreme Court of the United States, in 217 U. S., 209) on page 621:

> "We do not think it makes any difference whether the liability of one defendant arises from statute and the other from common law. The practical question to be decided is, is there a liability, and are the defendants all liable? And the particular source from which the liability of each defendant emanates cannot be material. The court's judgment is based on the liability of the defendant, whether statutory or common law, either one or both."

And as was said by the Court of Appeals of Georgia, in the case at bar, on pages 230 and 231 of 11th Georgia Appeals:

> "While the common law is presumed to be of force in nearly all of the American States, there is no such thing as a common-law liability except as such liability may be recognized by statute. While the right may be founded upon the common law, and the origin of the right may be derived from the common law, it is none the less statutory, since the common law has no force and effect in the several States except as it may have been adopted by statute. Alabama has as much right to withhold its sanction of a right existing at common law as it has to withhold legislative recognition of a new right now existing at common law."

Discussion of Sowers Case Continued.

The thing disregarded by the majority opinion of the Supreme Court in the Sowers case was the statute of New Mexico requiring suits to be brought therein and forbidding their bringing elsewhere. It was not New Mexico's interpretation or re-enactment of the common law which was disregarded. The court expressly held that New Mexico had as much right to put valid restrictions or conditions around a common law right recognized therein as around a statutory right. As the dissenting opinion states, in the Sowers case, on page 702:

"The Territory could have abolished the right of action altogether, if it had seen fit. It said by its statute that it would not do that, but would adopt the common law liability on certain conditions precedent, making them, however, absolute conditions to the right to recover at all. One of them was that the party should sue in the Territory."

In the Sowers case the common law rights recognized in New Mexico were no more sacred or free from touch by legislation than statutory rights. Common law rights are just as destructible, just as much capable of modification as if they had been expressly enacted by the legislature. Rights are rights, if recognized by the courts of a country.

In the Sowers case, the common law principles, which the plaintiff relied on for recovery were limited, hedged about and modified, to a great extent, by the legislature of New Mexico, by such requirements as notice, affidavits, service of list of witnesses, and the like, each and all of which conditions were held valid by this court. New Mexico could not have exercised more complete control over any newly created statutory right than it assumed to exercise over these common law rights, and with the approval of this court. All of these preliminary conditions and modifications of the common law rights were held to be good except the one which limited the place of suit to New Mexico. The very fact that in the Sowers case these various restrictions were all held good, and the one as to the place of suit alone held bad, is conclusive proof that that decision was treating New Mexico's conditions on the common law just as if it had been a complete legislative enactment embodying common law principles. As was said by the District Court of Utah, in the case of Coyne vs. Southern Pacific Rwy., 155 Federal, 683, cited by the plaintiff (which was an enactment of Nevada, substantially the same as that of New Mexico in the Sowers case, re-enacting common law principles in personal injury cases, and forbidding suits outside of Nevada in such cases):

"The first section of the Act quoted is declaratory of the common law theretofore existing in Nevada. The second section (prohibiting suits outside of Nevada) clearly limits the right. The statute as a whole supersedes the common law applicable to the subject. By a completeness of statement it covers the entire field, and was intended as a revision of the law."

The conclusion of the court in the Coyne case sustained the validity of the prohibitive clauses similar to those in the New Mexico statute, and of course conflicts with the Sowers case in this conclusion, and is over-ruled by the Sowers case, as the plaintiff in error admits, on page 25 of its brief. This Coyne case is the only opinion plaintiff in error cites in conflict with our contention.

Majority in Sowers case never held that a State could impose less conditions on common law than on statutory rights.

The discussion by the majority of the Court, in the Sowers case, never once went to the point of holding that the New Mexico statute did not, as a whole, give the common law the force of a statute. In describing the character of the rights claimed by the plaintiff, Sowers, the Court, on page 70 of the decision, alludes to the action as being "based upon common law principles although having certain statutory regulations." The court, in using this language, did not intend to deny the proposition that common law principles are frequently enacted into statutes, or frequently have the effect of statutes by some statutory recognition. On pages 68 and 69 of the decision, the court say that this legislation of New Mexico "does not undertake to create a new statutory cause of action, but refers to the common law or previous statutes of the Territory governing actions for personal injuries or wrongful death," and then proceeds to say that the statute puts a condition upon such action, describing the condition. In this particular the statute of New Mexico, in putting conditions upon previous common law or statutory rights, did the same thing that the State of Alabama in Section 6115 did as to previous Alabama statutes. It puts

a new and additional conidtion upon the previous statute, Section 3910. Thus, we have the Supreme Court, in the Sowers case, treating the New Mexico legislation, imposing conditions upon personal injury suits, as having the same effect on previous common law, as on previous statutory, rights. It thus appears that the court treated the New Mexico statute as applying clearly to all previous causes of action in personal injury cases, whether arising under common law or previous statutes. Indeed, all actions for death must have arisen under a statute, as they could not have arisen under the common law.

New Mexico ,while dealing with common law rights, put statutory conditions on them which, as a whole, made the rights statutory.

If the New Mexico act could affect a common law liability in certain particulars, it would clearly affect the statutory rights in the same class of cases in the same way. The New Mexico legislation did not refer either to previous statutes or previous common law rights. It merely referred to claims for damages for personal injuries. It merely happened as a condition of fact in the Sowers case that Sowers' claim was based upon common law principles.

The Supreme Court, in the Sowers case, gave effect to all the conditions in the New Mexico statute except the one as to the place of suit. Had the right Sowers relied on been created by a statute of New Mexico, limitations could have been given no more effect than the Supreme Court gave them as to the common law principles which Sowers actually did rely on.

Sowers decision, recognizing all conditions placed by New Mexico on common law right as binding, except as to place of suit, recognized States control over common law rights as fully as if they had been conditions on statutory rights.

As to the point in plaintiff in error's brief that the Sowers case is not in point, because the action there was upon common

law principles, we beg to state that the court in alluding to the action as founded on common law principles, was merely describing the character of the action, and not once was it said in that decision that New Mexico could not restrict and modify and condition common law rights, to the same extent as statutory rights, and the court actually did sustain other conditions to those common law rights, and only excepted the one on the place of suit. How is a condition or modification put upon a statutory right any more binding than one put upon a common law right? Indeed, the common law rights are hardly as sacred as statutory rights, because, in a way, the common law rights may be said to exist by construction or mere allowance, while the statutory rights exist by positive declaration or enactment. New Mexico could have destroyed all common law rights upon the subject of personal injuries, and have created any new statutory rights upon the subject. It could recognize a common law right, and put as many and valid conditions upon it as upon a statutory right. It could make the conditions an inherent part of the common law, as was attempted to be done in the Sowers case. The language of the New Mexico legislation, in the Sowers case, provided expressly that "such a right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover can exist for such injuries."

Language could not be stronger than this attempt by New Mexico to put a binding condition upon these common law rights.

The Sowers case is precisely analagous to the present case. The conclusion of the opinion in the Sowers case, in declining to give effect to the requirement that suits be brought in New Mexico alone, uses this language:

> "Of course the Territory of New Mexico could pass no law having force or effect over persons or property without its jurisdiction."

And in the concluding paragraph of the opinion the Court say:

"The Territory of New Mexico has the right to pass laws regulating recovery for injuries incurred within the Territory" (citing cases): "It has a right, under Section 906 of the Revised Statutes, to require other States, when suits are brought therein to recover for an injury incurred within the Territory, to observe the conditions imposed upon such causes of action, although otherwise controlled by comonm law principles. But when it is shown that the court in the other jurisdiction observed such conditions. and that a recovery was permitted after such conditions had been complied with, the jurisdiction thus invoked is not defeated because of the provision of the statute referred to."

Dissenting opinion in Sowers case clearly shows point decided.

The dissenting opinion in the Sowers case clearly shows the issue which divided the court. The dissenting opinion was to the effect that the condition prohibiting suits out of the State condtioned the right everywhere. The majority of the court held that it was such a condition as could not be enforced, referring to the principle that New Mexico could pass no law having an extraterritorial effect. The majority opinion, held, in effect, that the requirement to bring actions exclusively in the State, cannot be a condition precedent to the right of action itself. The place of trial is necessarily a matter of procedure or remedy. If the action is brought in the wrong court, it would not kill the right of action, but only that particular action. This is true of all actions every where. It will be noticed that the majority opinion in the Sowers case nowhere treats the requirement under discussion as a condition, although the statute expressly calls it a condition. The court make this allusion to it:

"The only feature of the New Mexico statute which was disregarded, was the requirement that suit should be brought only in the District Court of the Territory."

The Alabama amendments do not even limit such actions to a particular court, but generally require that they be brought in courts "of competent jurisdiction" which, as we have shown

elsewhere herein was a requirement existing independently of this legislation. This consideration shows that Section 6115 is without any practical effect upon actions in Alabama. The Alabama plaintiff is not required to do anything to protect his right to sue, but only to sue in a court of competent jurisdiction. Section 6115 does not either limit or add to or modify the right to sue in Alabama, all of which shows that this provision in Section 6115 is not really a condition. As the minority opinion said in the Sowers case "a condition that goes to the right conditions it everywhere" and further on the dissenting justice says:

> "I am willing to assume that the statute could not prohibit a suit in another State."

State can lay as many conditions on common law as on statutory rights.

In the Sowers case the Supreme Court goes to the fullest extent in holding that the New Mexico legislation has as much power over a common law cause of action as over a statutory cause of action. It is splitting hairs to say that if New Mexico has first brought into existence this cause of action, it could then impose any condition upon it which it pleased. Both the common law, as enforced in New Mexico, and the statutes as there enacted, were its children. It had the power of life and death over them. It could either destroy or rgulate them. Its power is just as strong over the common law principles as over the statutory. How does the mere fact of putting on the condition at the time the right comes into existence give rise to any distinction? In each case New Mexico is dealing with rights which it can either abolish or create to suit ieself.

In the case at bar full fath and credit was given to the Alabama law regulating the relation of master and servant. The Georgia court acted just as legally under the Alabama statute as any Alabama court could have done. Alabama can ask no more. The plaintiff pleaded the Alabama statute, and

set forth all of its terms. He introduced it in evidence. The judge read and construed the statute to the jury, and instructed them that it controlled the case. This is the only real point in which Alabama can have an interest, or which the Federal Constitution or statutes are designed to protect. The place of suit has nothing to do with the terms of the master and servant act.

1. GENERAL PRINCIPLES OF COMITY GOVERN THIS CASE; THE FEDERAL CONSTITUTION NEVER INTENDED TO INTERFERE WITH PRINCIPLE THAT LEX FORI CONTROLS IN ALL MATTERS OF REMEDY, PLACE OF SUIT AND PROCEDURE AND NOT LEX LOCI; THE AUTHORITIES WHICH WILL NOW BE DISCUSSED HOLD THAT, AS A GENERAL PRINCIPLE OF LAW, SUCH AN ENACTMENT AS SECTION 6115 OF ALABAMA CODE IS WITHOUT EFFECT.

In quite a number of instances the question of the extent to which conditions and limitations of the local law affect transitory actions have been before the courts. In very few of the cases has the application of the full faith and credit clause of the Federal Constitution been expressly considered; but we do not believe the general current of the authority upon this subject as now discussed is in conflict with the full faith and credit clause of the Federal Constitution but is in complete harmony therewith.

Some of the States of the Union define comity in a sort of sense of reciprocity, that is: they take cognizance of such causes of action arising in other States as courts of those other States take cognizance from the State in which the action is pending.

If this thing of comity depended upon whether Alabama allowed similar suits brought in its courts, we beg to call attention to the recent legislative act of Alabama passed in 1907

and found on page 67 of the Alabama Acts of 1907, which reads as follows:

> "That whenever, either by common law or the statutes of any State, a cause of action, either upon contract or in tort, has arisen in such other State against any person or corporation, such cause of action shall be enforceable in the courts of this State, in any county in which jurisdiction of the defendant can legally be obtained in the same manner in which jurisdiction could have been obtained if the cause of action had arisen in this State."

Thus we find that the Alabama legislature while seeking to hold all cases arising in Alabama for trial in Alabama courts, is at the same time inviting plaintiffs having cases occurring in other States to bring them to Alabama. What a situation this makes! Alabama says that all of its law suits arising in its borders it will keep at home by legislative enactment; all foreign law suits we will by legislative enactment invite to be brought in Alabama so long as the defendant can be found in Alabama. It closes the door to any person wishing to bring a suit elsewhere but opens it wide under the very same circumstances for a suit to be brought in Alabama if the cause of action arises elsewhere.

The obvious attempt of the Alabama Legislature in section 6115 is to deny to any person having a right of action—no matter where he may live or where he may want to bring his action —a right to invoke the Alabama Employer's Liability law, except in a court of Alabama. Can such a condition be put upon a law which another State will recognize? Has the Alabama legislature any such power? Is it not a fact that comity is not based upon the power of the State where the cause of action arose but is based upon the friendly feeling which one sovereign has for another? The court of the place of trial always adopts its own procedure, its own rule as to evidence, its own rules as to venue; it never adopts the lex loci as to provisions affecting procedure and practice and the mere question of remedies. It only calls in question the idea of comity so far as the law of

the other State is concerned, which affects the substantial rights of the parties. The Federal Constitution never requires one State to adopt the rules as to remedies and procedure of another State.

2. PLACE OF SUIT BELONGS TO REMEDY. NO LAW REGULATING REMEDY, ALTHOUGH CLAIMING TO BE PUT IN AS CONDITION OF A RIGHT, CAN HAVE EXTRATERRITORIAL EFFECT.

The attempt in section 6115 is futile because it is beyond the power of any Legislature to pass an act which will have extra territorial effect. The jurisdiction of the court of one State over a cause of action existing in another State cannot be derived from a grant by the Legislature of the other State; such jurisdiction, according to the principles of international and interstate law, is inherent in the court itself and regulated or restricted solely by the law making power of its own State. It depends on comity and is not conferred by the foreign State. So likewise the foreign State can neither limit nor withhold such jurisdiction.

If the Alabama law baldly provided that no suit should be brought under said Code sections "in any other State than Alabama"—this would be a plain attempt to restrict the jurisdiction of all courts outside of Alabama; but there is no substantial difference between such provision and one which says the suit shall be brought in Alabama "and not elsewhere."

The effort to deny to the courts of other States the jurisdiction or power to entertain suits founded on these sections of the Alabama Code or what is the same thing,—to change such actions from transitory to local actions, cannot be accomplished by putting the provision into the form of a **condition** or **limitation** upon the right of action. It is logically impossible to make the mere venue or place of suit or the court in which suit is to be brought a condition of the right of action. The place of

enforcement of a cause of action is a part of procedure, and procedure is determined by the lex fori. The Constitution of the United States never intended to interfere with the several principles we are now discussing.

3. A NUMBER OF CASES WILL NOW BE CITED IN WHICH THE COURTS OF ONE STATE, IN ENFORCING RIGHTS CREATED BY STATUTES OF OTHER STATES, HAVE IGNORED VARIOUS CONDITIONS WHICH HAVE BEEN HELD TO BE WITHOUT EXTRA-TERRITORIAL EFFECT.

The Wisconsin statute provided for recovery for a death caused by wrongful act, etc., "provide dthat such action shall be brought for a death caused in this State and in some court established by the Constitution of the same." It would seem that this provision was intended to make the jurisdiction of the Wisconsin court exclusive. This statute created a right of action which did not exist at common law, and in so doing, attempted to graft upon the right of action the condition that the action should be brought in a Wisconsin court. If this condition were valid, it would, of course, exclude the jurisdiction of any United States court; but the Supreme Court of the United States held unanimously that this statute could not so limit the right of action, saying: "No condition imposed upon the right granted by a State, which prevents one from availing himself of his constitutional prerogative of appeal to the courts of the United States, can be upheld. Such condition conflicts with the Federal Constitution and is nugatory and void."

Chicago R. Co. vs. Whitten, 13 Wall, 270.

And in a later case, the United States Circuit Court of Appeals made the same ruling upon the Wisconsin statute, saying: "The proviso of the act in question, if it was designed to,

and so far as it restricts the enforcement of the right to a State court is, in our judgment inoperative and void."

Bigelow vs. Nickerson, 70 Fed. Rep., 113; 30 L. R. A., 336.

4. MISSOURI COURT HOLDS KANSAS SUIT WHICH SOUGHT TO RESTRICT THE BRINGING OF ACTIONS BY RAILROAD EMPLOYEES UNDER KANSAS STATUTES TO THE COURTS OF KANSAS WAS WITHOUT EFFECT IN MISSOURI. THIS CASE PRACTICALLY THE SAME AS THE CASE AT BAR. THE MISSOURI COURT USES THE FOLLOWING SIGNIFICANT LANGUAGE "PRESCRIBING WHERE THE ACTION SHALL BE INSTITUTED HAS NOTHING TO DO WITH THE CREATION OF THE RIGHT OF ACTION."

The statutes of Kansas provide specifically where actions shall be brought against a railroad company and also provide for an action for death or injury to a railroad employee by the negligence of a fellow servant, provided a certain notice should be given to the defendant within eight months after the injury and that the notice should be served on a person designated by the railroad in the county in which the action is brought, or if no such person has been designated, on any local superintendent, freight agent, etc. In a suit brought in Missouri for an injury in Kansas, it was claimed by the defendant that the Kansas statutes made the action local to Kansas by reason of the requirements as to venue and service of notice. This contention was disposed of by the Missouri court holding that the venue statute did not destroy the transitory nature of an action for wrongful death in so far as other States were concerned; and that, though the giving of notice was a condition of the right of action,—the particular mode of serving the notice was a matter of procedure and could not have effective force and application when the action is brought in a foreign State. In

this case the specific claim was made by defendant that Kansas had a right to legislate not only as to what should constitute a cause of action, but also to place on and about the same any limitations as to when and where the suit might be brought. In the opinion the court used this expression: "Prescribing where the action shall be instituted has nothing to do with the creation of the right to the action."

Husted vs. Mo. Pac. R. Co., 128 S. W. Rep., 282.

In another case the same Missouri court has occasion to pass on substantially the same question arising under the law of Kansas and held: "Section 4821 (of Kansas statutes) designates the jurisdiction in which suits shall be brought as against railroads and other common carriers. This provision is interposed to defeat plaintiff's cause of action. A sufficient answer to this objection is that the law of Kansas in that respect does not obtain in this State. The jurisdiction of the courts of this State is regulated by its own Code.'"

Philes vs. Mo. Pac. R. Co., 125 S. W. Rep., 553, 555.

5. OTHER CASES CONSIDERED IN WHICH PROVISIONS OF THE LAW OF STATE CREATING THE RIGHT HAVE BEEN IGNORED IN THE LEX FORI.

The homicide statute of Maryland provided that the suit should be brought by and in the name of the State of Maryland for the use of the wife, etc. If such a provision should be effective, it would seem that this one would have the effect of making the action local to Maryland. But the Supreme Court of the United States sustained an action brought in the District of Columbia for a death occurring in Maryalnd, holding that the action was transitory and that the State of Maryland was only a nominal party.

Stewart vs. B. & Co. R. R. Co., 168 U. S., 445.

Again in a later case, the Federal Court in New York sustained an action there for a homicide occurring in Maryland,

holding that the bringing of the suit by and in the name of the State of Maryland was a matter of local procedure.

Hollenbach vs. Elmore Contracting Co., 174 Fed. Rep., 845.

The Georgia decisions upon this question lay down the same principles as the foregoing authorities.

So. Ry. Co. v. Decker, 5 Ga. App., 21.

So. Ry. Co. vs. Robertson, 7 Ga. App., 154, 162.

In the Decker case the Court of Appeals said: "Our own sense of justice, subject to the guidance of the law making power of this State, determines solely and alone what laws, domestic or foreign, we will enforce; and this discretion is subject to neither limitation nor extension by the legislature of any other State." This decision, like that o the Ufnited States Supreme Court, was not put on the narrow, technical ground that section 6115 of the Alabama Code was not a part and parcel of the Employer's Liability Act, but on the broad ground that the court of another State could not recognize a limitation which undertook to make the action local to Alabama.

The truth is, this question is not one of local law but one of international and interstate law. Whether the action shall be held transitory or not is determinable solely by the court in which the action is brought. It depends on the lex fori and not on the lex loci.

In a Louisiana case which was an action for damages caused by a steamer running into and injuring certain buildings (which is clearly a local action under the common law) it was held that the action would lie in Louisiana though the tort occurred in Illinois,—the court, per Justice G. J., saying:

> "The exception taken by the defendants that the plaintiff's action could not be maintained in this State because under the common law which prevails in Illinois, it would be held to be local, and the plaintiff's remedy be confined to the country in which the cause of action originated, was properly over-ruled by the District Court. The present

action is, under the laws, a personal action and is not distinguished from any ordinary civil action as to the place or tribunal in which it may be brought."

Holmes vs. Barclay, 4 La. An., 63.

Another authority says:

"Whether a particular action is to be regarded as local or transitory and hence whether a remedy shall be given for a foreign tort depends upon the lex fori, not upon the law of the place where the cause of action arises. The question relates to the remedy, not to the substantive liability."

Minor's conflict of laws, sction 192, p. 476.

Another authority says:

"Having stated these general principles in relation to jurisdiction (the result of which is that no nation can rightfully claim to exercise it except as to persons and property within its own domains)—we are next led to the consideration of the question, in what manner suits arising from foreign causes are to be instituted and proceedings to be had until the final judgment. Are they to be according to the law of the place where the parties, or either of them, live? Or are they to be according to the modes of proceding and forms of suits prescribed by the laws of the place where the suits are brought? Fortunately, here there is scarcely any ground left open for controversy, either at the common law or in the opinion of foreign jurists or in the actual practice of nations. It is universally admitted and established that the forms of remedies and the modes of proceeding and the execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted; or, as the civilians uniformly express it, according to the Lex Fori."

Story's conflict of laws, section 556, p. 931.

Again:

"The forms of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted without any regard to the domicil of the parties, the origin of the right, or the country of the act."

Story's conflict of laws, section 558.

To the same effect was the decision of the House of Lords in Donn v. Lippman, 5 Clark and Fin. 1, 13, 14, in which Lord Broughman said: "No one can say that because the contract has been made abroad, the form of action known in the foreign court must be pursued in the courts where the contract is to be enforced or the other perliminary proceedings of those courts must be adopted, or that the rules of pleading or the curial practice of the foreign coutnry must necessarily be followed."

In an old English case quoted in Story's Conflict of Laws, section 571, Lord Tenterden said: "A person sunig in this country must take the law as he finds it. He cannot by virtue of any regulation in his own country enjoy greater advantages than other suitors here, and he ought not therefore, to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to."

Judge Story further says: "No sovereignty can extend its process beyond its own territorial limits, to subjects either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity and incapable of binding such persons or property in any other tribunals."

Story's Conflict of Laws, Section 539.

He also says:

> "No one, for instance, would imagine that a judgment of the parent country, confiscating the property or extinguishing the property or extinguishing the personal rights or personal capacities of a native subject, on account of such a foreign residence would be recognized in any other country."

Story's Conflict of Laws, 540.

Then how can the effort of the Alabama Legislature to strip all persons injured in Alabama, of their rights of action as soon

as they cross the State line, be justly recognized or enforced by the courts of any other State?

The statutes of Ohio exempted the personal earnings of a debtor from levy or attachment and made it unlawful and a misdemeanor for any one to assign a debt for the purpose of having it collected by attachment, and thus defeating the exemption in courts outside the State or to send it outside the State for such purpose. An Ohio judgment-creditor assigned his judgment to a third person who brought suit on it by attachment and garnishment in West Virginia, and the defendant pleaded the provisions of the Ohio laws in defense of the suit. The Supreme Court of West Virginia sustained the action and subjected the wages, although it was conceded that the creditor and debtor were both citizens of Ohio, and that the judgment had been transferred and sent to West Virginia for suit for the very purpose of evading the laws of Ohio.

Stevens v. Brown, 20 W. Va., 450.

The case last cited contains a discussion of interstate law and comity which makes it well worth referring to.

There are three respects in which the attempted restriction of actions for personal injury and homicide to the Alabama courts is manifestly unreasonable and unjust. In the first place, it is an arbitrary selection of particular kinds of torts to be thus restricted, leaving all other kinds of torts suffered in Alabama and all causes of action **ex contractu** arising in Alabama, free to prosecution in the courts of other States. The Alabama Supreme Court has held an Alabama law to be unconstitutional on the ground that it discriminated against a particular class of litigants.

S. & N. Ala. R. Co. v. Morris, 65 Ala., 194.

The same principle was decided in Gulf R. Co. v. Ellis, 165 U. S., 150.

In the second place, these amendments to the Alabama Code are unreasonable, because, if sustained, they would prvent a

citizn of any other State from maintaining any action in the courts of his own State, on account of injuries received in Alabama. The "equal privileges and immunities" clause of the Federal Constitution requires the courts of each State to accord to citizens of other States the same treatment as citizens of its own State receive. This constitutional provision applies to the entertaining of transitory actions.

Ringartner v. Ill. Steel Co. (Wis.), 34 L. R. A. 503.

Godfrede v. Gartner (Mich.), 7 L. R. A., 512.

Stevens vs. Brown, 20 W. Va., 450.

In the third place, the Alabama law is unreasonable, because any defendant guilty of any tort under the Code sections as amended can wholly escape liability by absenting himself from that State. See Nelson vs. C. & O. R. Co., 88 Va., 971; 15 L. R. A., 583.

But any attempt on the part of the Alabama Legislature to control the bringing of a transitory action in Georgia is absolutely without effect. The Legislature of Alabama can merely grant certain rights which result in the accrual of causes of action. As to where those causes of action shall be enforced are matters for the forum in which the action is brought.

In the exhaustive note to Railroad vs. Hurd, 56 L. R. A., 196, the editor at the bottom of the page in the note lays down the following in reference to rights of action under foreign statutes:

> "The operation of that (the foreign) statute is exhausted when it fastens upon acts occurring within the State in which it is enacted and out of them creates a complete right of action. When the court of another State takes jurisdiction of that right of action, it does so by virtue of its own inherent jurisdiction, acting upon the principle of comity, and not by virtue of the foreign statute. That statute while the source of the right on which the jurisdiction acts, is not the source of the jurisdiction itself."

In other words, the court of the State in which the case is tried has the jurisdiction to enforce any rule of law it wants

when it gets the parties before it, subject only to the Federal Constitution and laws. Its acquiring jurisdiction is not a matter of grace or a matter of grant from the foreign State in any sense whatever, but having acquired jurisdiction, it necessarily must select some rule of law to apply to the case, and if the cause of action accrued in a foreign State, then out of comity it will follow, so far as the law is concerned, the law of such foreign State; but so far as its right to try the case and its jurisdiction are concerned, the law of the foreign State has no application whatever.

"The vast majority of states" says this editor on page 196 of 56 L. R. A., "recognize and assert the general principle that the courts of one State or country will entertain actions for bodily injuries or death, based on the statutes of another"—citing a long list of cases.

It can make no difference, as heretofore argued, in enforcing a right which accrued in Alabama whether it was created by a statute or arose at common law. If it arose at common law, Georgia will construe the common law for herself. See the case of Atlanta and West Point R. R. Co. vs. Krogg, 77 Ga., 202. If it arose under a statute, Georgia will adopt the construction of the statute, so far as the rights of the parties are concerned, which the State enacting the statute has adopted.

"Comity will enforce rights, not in their nature local and not contrary to the policy of the government of the tribunal, no matter where arising and without regard to whether they are of common law or statutory origin. There is no difference in this respect between such rights—except in the presumption that common law rights in other States are similar to our own and the absence of such presumption and consequent necessity of proof in regard to rights merely statutory."

See note on page 197 of 56 L. R. A., citing Usher vs. Railroad, 126 Pa., 206, reported in 4 L. R. A., 261.

In Herrick vs. Railroad, 47 Am. Rep., 772 (35 Minn., 11), the court says:

"Whenever by either common law or statute, a right of action has become fixed and a legal liability incurred, that liability, if the action be transitory, may be enforced, and the right of action pursued in the courts of any State which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the State where it is sought to be enforced."

Again, on the same page, this court in the same Herrick case, says:

"The statute of another State has, of course, no extra-territorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought."

6. EFFECT OF ALABAMA STATUTE IS AN ATTEMPT TO CLASSIFY ACTIONS AS LOCAL WHICH ARE ESSENTIALLY AND INHERENTLY TRANSITORY. ALABAMA CANNOT BY ITS MERE LEGISLAITVE COMMAND CHANGE THE INHERENT CHARACTER OF ACTION S OS TO BIND OTHER STATES.

The Alabama statute is merely an attempt to prevent actions under the Employer's Liability Act from being classed as transitory actions. The Alabama legislature cannot by mere enactment give a right of action a character which it does not possess. These actions are transitory and not local, by all the decisions. Each State must determine for itself the status of an action and whether such action is transitory or local only.

Suppose the Legislature of Alabama had enacted that no suit should be brought under the Employer's Liability Act

except in a court of equity and had especially made it a subject of chancery jurisdiction in Alabama: would this bind Georgia? Would it not merely relate to the remedy?

The Alabama Legislature cannot name a horse a mule and commit the State of Georgia to it. Georgia must classify an action according to its own intrinsic character.

7. WHEN A RIGHT GRANTED BY STATUTE OF ONE STATE IS SET UP IN ANOTHER STATE, ALL THE REMEDIES AND MACHINERY FOR PROCEDURE PREVAILING IN STATE OF ENACTMENT, ARE NOT TRANSPLANTED TO THE STATE WHERE THE CAUSE IS PENDING. LAWS PERTAINING TO REMEDIES MERELY OF THE LEX LOCI ARE IGNORED BY THE LEX FORI.

The whole subject of determining the venue of this action and where it shall be brought relates to the remedy and not to the right. Alabama has created the right by the general enactment of this law. When it comes to determining the place where the right shall be enforced, we are dealing with the subject of remedy. If there is only one State in which such rights could be enforced, the remedy is narrowed. If it is extended to other States, the remedy is enlarged. The right is not in any way affected; it remains the same. Whether a person can sue in one court or in ten courts for a right which is fixed by law, is bound to be a question of remedy.

Plaintiff in error in contending that all the provisions of the Code of 1907 are part of the same statute by which 3910 is enacted and must be read into 3910, has reduced itself to this position:

If 3910 is qualified by every condition in the Alabama Code of 1907, including section 6115, it is also qualified by all those

conditions which require actions such as this to be tried in a Circuit Court and is also qualified by every other local condition as to remedy which prevails in Alabama. This shows that the entire Code of Alabama cannot be considered as part and condition of section 3910. The law's machinery in the other States is not identical with the machinery in Alabama. Georgia has no circuit courts; its provision as to juries is totally different; its provision as to the burden of proof is totally different; its provision as to the appeal of cases differs. Necessarily, therefore, when a case under 3910 is brought in another State, all those conditions in the Alabama Code which have to do merely with procedure and remedy are eliminated and 6115 belongs as much to the class of procedure and remedy as does th provision of the Alabama Code defining the jurisdiction of its circuit courts or defining the burden of proof or regulating the drawing of juries.

Where the right to sue is created by the statute of one State and a particular kind or form of remedy is provided, the courts of the State in which the case is brought frequently disregard the remedy provided and enforce the right; as see the case of Stewart vs. Railroad, 166 U. S., 445, where the statute of Maryland required the action for death to be brought in the name of the State for use of certain persons, while the statute of the District of Columbia required it to be brought by the personal representative; and the action was allowed to be brought by the personal representative as provided by the law of the District of Columbia.

In 22 A. & E. Ency of Law, pages 1383 and 1384, we have the following in the text:

"The lex fori governs in all matters relating to the remedy and the course of procedure. Thus it governs as to the form of actions or process, the court, whether law or equity, in which the action must be brought, the parties to the suit and the sufficiency of the pleadings.

8. IT CAN NEVER BE ARGUED THAT ALL THE REMEDIES OF THE LEX LOCI ENTER INTO THE RIGHT AS CONDITIONS. IF THIS WERE THE CASE, NO RIGHT COULD EVER BE ASSERTED EXCEPT IN THE STATE CREATING IT.

If the principle on which the courts of one State enforce the laws of another is comity (except as regulated by the Federal Constitution) and if the courts of the lex fori adopt the law of the lex loci as to rights but discard the law of the lex loci as to remedies,—it could as well be argued that the remedies of the lex loci enter into and become conditions of all rights granted by a State as that in this case this attempt of the Alabama Legislature could be enforced in Georgia. The law of the lex loci as to remedy is disregarded by the lex fori. Georgia has undoubted jurisdiction of the parties and it is only on principles of comity that it enforces the lex loci, except as far as the Federal law controls. It could as well be argued that all of the lex loci formed one harmonious whole and that its particular laws as to remedy entered into and became part of the right; that when the right is created or recognized it was contemplated by the law makers of the lex loci that the remedies of the lex loci should be applied, and that they would not have granted the right on any other conditions than the application of those remedies. But such a contention has never been held to be the law. The lex fori determins for itself what is part of the remedy and in the case at bar it cannot be argued in any sense whatever that this attempt to fix the venue is anything except a law relating to the remedy. It cannot affect the right any more than any other local law directing particular remedies affects the rights. If in the Stewart case, the right to sue for death was granted only upon condition that the State become a party for the use of certain persons, and if it was held by the Supreme Court of the United States that this nomination of the State as to party was only a part of the

remedy, certainly it can be held that the Alabama law in this case is only a part of the remedy.

Some instructive law can be found in the 4th Sutherland on damages, Sec. 1280, in which the following occurs:

"These statutes (Lord Campbell's acts) have no extra territorial effect. It is, however, a general principle that where either by common law or statute, a right of action has become fixed and a legal liability incurred, if transitory, it may be enforced in the courts of any State in which jurisdiction of the defendant can be obtained, provided it is not against the public policy of the State where it is sought to be enforced. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought. This rule applies as to the amount recoverable if a limitation is fixed by the law of the forum."

Further on in the same section 1280 of 4th Sutherland on damages, is the following:

"In Missouri the statute provides for the bringing of an action for a death caused in the State and in some court thereof. This did not bar the right to maintain an action for a death which occurred in another State as the result of wrongful and negligent acts committed by the defendant in Wisconsin."

9. AN ANALYSIS OF THE CASES CITED BL THE PLAINTIFF IN ERROR SHOWS THEY ARE NOT APPLICABLE.

None of the cases decided by this court in any way conflict with the decision below in this case. We will now notice some of the cases claimed to be in point by plaintiff in error:

Galveston, etc. Co. vs. Wallace, 223 U. S., 481, was not the case of a legislative enactment by one of the States but was a mere collateral bringing into question of an Act of Congress.

Plaintiff in error in that case contended that beacuse, by the original Act of 1887, persons damaged by a violation of the statute might make complaint before the Commission, or in any District Court of the United States,—that the amendment of 1906 was equally exclusive and prevented the State courts from taking jurisdiction:; but this court in the Wallace case held that the damage caused by failure to deliver goods in the case under consideration was not traceable to a violation of the statute and therefore was not covered by the law requiring complaints before certain tribunals; and the court then proceeded to consider merely the general question as to whether a State court might enforce a right of action arising under the Act of Congress, and in the course of the opinion, the court uses this language:

"Statutes have no extraterritorial operation, and the courts of one government cannot enforce the penal laws of another. At one time there was some question both as to the duty and power to try civil cases arising solely under the statutes of another State. But it is now recognized that the jurisdiction of State courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the State in which the suit is brought. Where the statute creating the right provides an exclusive remedy to be enforced in a particular way or before a special tribunal the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and State government, there is no prsumption that Congress intended to prevent State courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal statute."

It will thus be seen that the Wallace case was not dealing with any case like the one at bar whatsoever, but was distin-

guishing that from a case where Congress itself in giving a new right, had limited the enforcement of that right to certain courts. Of course, no one doubts that when the Congress creates a new right, it can require that right to be asserted only in a certain court. Congress is supreme within the sphere of its power, both as to the creation of rights and remedies. There is no question of lex loci and lex fori under the Act of Congress. When the Act of Congress is passed it becomes instantly the law of every State. It is as much the law of the State as it is the law of the nation, and any attempt to enforce that Act of Congress must follow the Act, both as to rights, limitations of the rights, remedies and everything else, if the remedies are provided as exclusive. There is no analogy whatsoever between the Act of Congress which undertakes to provide a remedy in one tribunal and an Act of a State which undertakes to provide a remedy only in one place. The Act of Alabama in the case at bar did not undertake to erect any special tribunal to try cases under 3910, even if it could have done so; it merely attempted to regulate the place where the right should be asserted and left it to any court of competent jurisdiction in that place.

In the second Employer's Liability cases reported in 223 U. S., page 1 and on page 57 of the opinion, the court uses this language:

"The suggestion that the Act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible because it pre-supposes what in legal contemplation does not exist. When Congress, in the exertion of the power confined to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the Act had emanated from its own legislature, and should be respected accordingly, in the courts of the State, as was said by this court in Clafling vs. Houseman, 93 U. S., 130, 136, 137, 23 L. ed. 833, 838, 839."

The extract just quoted shows that an Act of Congress erecting a special tribunal or designating an exclusive place, stands on a wholly different footing from the law of a State in the Union. The Act of Congress becomes instantly the law of every State and if it is constitutional, it must be recognized.

Plaintiff in error cites the case of Harrisburg, 119 U. S., page 199. The only effect of the Harrisburg decision is that a time limitation put in as a condition af a creation of a new right is binding everywhere. Of course, there is no dispute as to so plain a proposition as this. This is a limitation which can be enforced everywhere. This is no attempt to decide for another State what faith and credit shall be given to the law of the State. It limits the State passing the law to the time, just as much as it does any other State. It is not confined in its enforcement to the State passing the law. It applies as a condition equally everywhere.

The next case is the case of Davis vs. Mills cited in 194 U. S., 451, which is also merely a time limitation

The next case cited is the case of Munos vsfl Railway, 51 Federal, 188, which was another time limitation; likewise as to Stern vs. LaCampagnie, etc., 110 Fed., 996.

The next case cited by plaintiff in error is the case of Edna, 185 Federal, 206 as to which plaintiff in error says after quoting the case "(Alabama statute)." The Alabama statute, however, involved, was not this statute at all and nothing like it, but related to an Alabama statute giving a lien on domestic vessels for supplies and providing a time limitation for the enforcement of that lien.

The case of U. S. vs. Boomer, 183 Federal, 726 involved an Act of Congress, nothing like this.

The case of Coyn vs. So. Pac., 155 Fed., 683, is a decision by the District court of Utah and is in direct conflict with the Sowers case as is admitted in brief of plaintiff in error, the decsion in the Coyn case holding that a re-enactment of the com-

mon law with the imposition of certain conditions prohibiting suts outside of Nevada in personal injury cases was valid and binding on other States. Of course, it is needless to comment upon this decision, because the case of Sowers in 213 U. S. is directly to the contrary.

The other cases cited by plaintiff in error only refer to general principles as to which there is no dispute.

Respectfully submitted,

REUBEN R. ARNOLD,

For Defendant in Error.

OPINION

TENNESSEE COAL, IRON & RAILROAD COMPANY *v.* GEORGE.

ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

No. 299. Argued March 17, 1914.—Decided April 13, 1914.

While the courts of a State are bound to give full faith and credit to all substantial provisions of a statute of another State creating a transitory cause of action which inhere in the cause of action or which name conditions on which the right to sue depends, venue is no part of a right, and whether jurisdiction exists is to be determined by

the law of the State creating the court in which the case is tried.

A State cannot create a transitory cause of action and at the same time destroy the right to sue thereon in any court having jurisdiction although in another State.

The jurisdiction of a court over a transitory cause of action cannot be defeated by the extraterritorial operation of a statute of another State even though the latter created the cause of action.

The statute of Alabama making the master liable to the employé for defective machinery created a transitory cause of action which can be sued on in another State having jurisdiction of the parties, notwithstanding the statute provides that all actions must be brought thereunder in the courts of Alabama and not elsewhere.

A state court does not deny full faith and credit to a statute of another State by taking jurisdiction of a transitory cause of action created thereby, although such statute provides that the action can only be brought in the courts of the enacting State. *Atchison &c. Ry.* v. *Sowers*, 213 U. S. 55.

11 Ga. App. 221, affirmed.

THE facts, which involve the validity of a judgment of the courts of the State of Georgia and the determination of whether those courts gave full faith and credit to a statute of the State of Alabama affecting the cause of action, are stated in the opinion.

Mr. Alexander W. Smith for plaintiff in error:

The mandate of the full faith and credit clause of the Constitution of the United States is not obeyed in the courts of a State when it recognizes the public acts of a sister State, creating a right of action nonexistent at the common law, and refuses compliance with the provision of the same statutes restricting the enforcement of that right to the courts of competent jurisdiction in the State creating it. *A., T. & S. F. Ry.* v. *Sowers*, 213 U. S. 55; *El Paso &c. Ry.* v. *Gutierrez*, 215 U. S. 87.

The condition, or limitation, put upon a right of action created by statute, and not existing at common law, inheres in the right itself and follows it into other jurisdictions. *Galveston &c. Ry. Co.* v. *Wallace*, 223 U. S. 481, 490;

The Harrisburg, 119 U. S. 199; *Davis* v. *Mills*, 194 U. S. 451, 454; *Munos* v. *So. Pac. Co.*, 51 Fed. Rep. 188; *Stern* v. *LaCompagnie &c.*, 110 Fed. Rep. 996 (2); *The Edna* (Ala. statute), 185 Fed. Rep. 206; *United States* v. *Boomer*, 183 Fed. Rep. 726; *Coyne* v. *So. Pac. Co.*, 155 Fed. Rep. 683.

Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right.

Such a condition, or limitation, need not be contained in the same statute. It operates the same way if it be specially attached to such a statutory right of action subsequently and in a different statute. *Davis* v. *Mills*, 194 U. S. 451, 454.

The courts of the United States take judicial notice of the public laws of each State of the Union. *Mills* v. *Green*, 159 U. S. 651, 657.

Where a limitation to local courts is affixed to a cause of action existing at the common law, and independently of the statute affixing it, the limitation may be disregarded as in the *Sowers Case, supra.* A well defined distinction exists between cases based on common law liability and those depending on statutory rules of liability. *Charleston &c. Ry. Co.* v. *Miller*, 113 Georgia, 15; *Chicago &c. Ry. Co.* v. *Ross*, 112 U. S. 377, 382; *Missouri &c. Ry. Co.* v. *Mackey*, 127 U. S. 205; *B. & O. R. R.* v. *Baugh*, 149 U. S. 368, 378, 379; *Missouri Pac. Ry.* v. *Castle*, 224 U. S. 541; *Employers' Liability Cases*, 207 U. S. 463, 537; *Second Employers' Liability Cases*, 223 U. S. 1, 49; *Mobile Ry. Co.* v. *Holburn*, 84 Alabama, 133; *S. C.*, 4 So. Rep. 146.

"Interstate venue," or venue as between different countries, is jurisdictional. "Municipal venue," or venue as between different places in the same jurisdiction, as a rule has to do with procedure merely. *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105, 108; *British So. Africa Co.* v. *Companhia &c.*, 2 Q. B. 358.

There is a distinction between the existence of jurisdiction in a given court and its proper exercise in a given case therein. *Smith* v. *McKay*, 161 U. S. 355, 358; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 233; *United States* v. *Larkin*, 208 U. S. 333, 338; *Fore River &c.* v. *Hagg*, 219 U. S. 175; Van Fleet's Collateral Attack, Chap. IV.

Dennick v. *R. R. Co.*, 103 U. S. 11, 18; *Texas &c. Ry. Co.* v. *Cox*, 145 U. S. 593; *Stewart* v. *B. & O. R. R.*, 168 U. S. 445; *Whitman* v. *Oxford National Bank*, 176 U. S. 559, can be distinguished, as in not one of these cases was the right of action restricted or limited by the law which created it, and that restriction disregarded.

The principle involved is closely analogous to that found in the decisions relative to the enforcement of "death statutes" enacted in one State and invoked in another. All restrictions and limitations therein found are enforced everywhere. *Slater* v. *Mex. Nat. R. R.*, 194 U. S. 120, 126; *Chambers* v. *B. & O. R. R.*, 207 U. S. 142.

So, also, it is analogous to the application of statutes of limitations of the *lex loci* in the forum. *Davis* v. *Mills*, 194 U. S. 451, 457; *Selma &c.* v. *Lacey*, 49 Georgia, 106.

So, also, it is analogous to the question of statutory venue of suits under the act of Congress authorizing actions on contractors' bonds in Government work. *Davidson &c. Co.* v. *Gibson*, 213 U. S. 10, 16; *United States* v. *Boomer* (8 C. C. A.), 183 Fed. Rep. 726; *United States* v. *Congress Construction Co.*, 222 U. S. 199; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 213 U. S. 55.

Inasmuch as the statutes of Alabama, here under consideration, confessedly create a new and statutory cause of action, expressly abrogating common law principles otherwise applicable, the *Sowers Case, supra*, does not support the judgment.

Mr. Reuben R. Arnold for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

Wiley George, the defendant in error, was an engineer employed by the Tennessee Coal, Iron and Railroad Company at its steel plant in Jefferson County, Alabama. While he was under a locomotive repairing the brakes, a defective throttle allowed steam to leak into the cylinder causing the engine to move forward automatically in consequence of which he was seriously injured. He brought suit by attachment, in the City Court of Atlanta, Georgia, founding his action on § 3910 of the Alabama Code of 1907, which makes the master liable to the employé when the injury is "caused by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the master or employer."

The defendant filed a plea in abatement in which it was set out that § 6115 of that Code also provided that "all actions under said section 3910 must be brought in a court of competent jurisdiction within the State of Alabama and not elsewhere." The defendant thereupon prayed that the action be abated because "to continue said case on said statutory cause of action given by the statutes of Alabama and restricted by said statutes to the courts of Alabama, . . . would be a denial so far as the rights of this defendant are concerned, of full faith and credit to said public acts of the State of Alabama in the State of Georgia, contrary to the provisions of Art. 4, § 1 of the Constitution of the United States." A demurrer to the plea in abatement was sustained and the judgment for the plaintiff thereafter entered was affirmed by the Court of Appeals. The case was then brought to this court.

The record raises the single question as to whether the full faith and credit clause of the Constitution prohibited the courts of Georgia from enforcing a cause of action

given by the Alabama Code, to the servant against the master, for injuries occasioned by defective machinery, when another section of the same Code provided that suits to enforce such liability "must be brought in a court of competent jurisdiction within the State of Alabama *and not elsewhere.*"

There are many cases where right and remedy are so united that the right cannot be enforced except in the manner and before the tribunal designated by the act. For the rule is well settled that "where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed." *Pollard* v. *Bailey*, 20 Wall. 520, 527; *Galveston Ry.* v. *Wallace*, 223 U. S. 481, 490; *Stewart* v. *B. & O. R. R.*, 168 U. S. 445; *National Bank* v. *Francklyn*, 120 U. S. 747, 753.

But that rule has no application to a case arising under the Alabama Code relating to suits for injuries caused by defective machinery. For, whether the statute be treated as prohibiting certain defenses, as removing common law restrictions or as imposing upon the master a new and larger liability, it is in either event evident that the place of bringing the suit is not part of the cause of action,—the right and the remedy are not so inseparably united as to make the right dependent upon its being enforced in a particular tribunal. The cause of action is transitory and like any other transitory action can be enforced "in any court of competent jurisdiction within the State of Alabama. . . . " But the owner of the defective machinery causing the injury may have removed from the State and it would be a deprivation of a fixed right if the plaintiff could not sue the defendant in Alabama because he had left the State nor sue him where the defendant or his property could be found because the statute did not permit a suit elsewhere than in Alabama. The injured plaintiff may likewise have moved from Alabama and for that, or other, reason may have found it to his interest to

bring suit by attachment or *in personam* in a State other than where the injury was inflicted.

The courts of the sister State trying the case would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action or which name conditions on which the right to sue depend. But venue is no part of the right; and a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation and cannot be defeated by the extraterritorial operation of a statute of another State, even though it created the right of action.

The case here is controlled by the decision of this court in *Atchison &c. Ry.* v. *Sowers*, 213 U. S. 55, 59, 70, where the New Mexico statute, giving a right of action for personal injuries and providing that suits should be brought after certain form of notice in a particular district, was preceded by the recital that "it has become customary for persons claiming damages for personal injuries received in this Territory to institute and maintain suits for the recovery thereof in other States and Territories to the increased cost and annoyance and manifest injury and oppression of the business interests of this Territory and in derogation of the dignity of the courts thereof." Despite this statement of the public policy of the Territory, the judgment obtained by the plaintiff in Texas was affirmed by this court in an opinion wherein it was said that where an action is brought in "another jurisdiction based upon common law principles, although having certain statutory restrictions, such as are found in this [territorial] act as to the making of an affidavit and limiting the time of prosecuting the suit, full faith and credit is given to the law, when the recovery is permitted, subject to the restrictions upon the right of action imposed in the Territory enacting

the statute. . . . When it is shown that the court in the other jurisdiction observed such conditions, and that a recovery was permitted after such conditions had been complied with, the jurisdiction thus invoked is not defeated because of the provision of the statute" requiring the suit to be brought in the district where the plaintiff resides or where the defendant, if a corporation, has its principal place of business.

It is claimed, however, that the decision in the *Sowers Case* is not in point because the plaintiff was there seeking to enforce a common law liability, while here he is asserting a new and statutory cause of action. But that distinction marks no difference between the two cases because in New Mexico, common law liability is statutory liability—the adopting statute (Compiled Laws, § 1823), providing that "the common law as recognized in the United States of America shall be the rule of practice and decision."

The decision in the *Sowers Case*, however, was not put upon the fact that the suit was based on a common law liability. The court there announced the general rule that a transitory cause of action can be maintained in another State even though the statute creating the cause of action provides that the action must be brought in local domestic courts.

In the present case the Georgia court gave full faith and credit to the Alabama act and its judgment is

Affirmed.

MR. JUSTICE HOLMES dissents.